

The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony

by Victoria Mikesell Mather*

I. INTRODUCTION

The common practice of wife beating is a 'skeleton in the closet' of many families today.¹ In recent years, however, the public has focused much attention on the phenomenon of the battered woman, bringing the battering relationship and its consequences to the forefront of American social consciousness. The numbers are staggering: FBI statistics show that a husband or boyfriend beats a woman in the United States approximately every eighteen seconds;² other sources estimate that somewhere between two and six million women will be beaten by their mates each year;³ and experts believe that between one-half and two-thirds of all marriages will experience at least one battering incident during the relationship.⁴ The figures are somewhat speculative since wife beating is still

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1. The author uses the terms wife and woman interchangeably in this Article because many female victims of battering are not married to their abusers, but live with them.

2. A wide range of such statistics are cited in Moore, *Editor's Introduction*, in *BATTERED WOMEN* 7, 13-14 (D. Moore ed. 1979), in J. FLEMING, *STOPPING WIFE ABUSE* 330-32 (1979), and in D. MARTIN, *BATTERED WIVES* 11-14 (1976).

3. Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 273 (1985) (citing *Wife Beating: The Silent Crime*, TIME, Sept. 5, 1983, at 23); and G. GOOLKASIAN, *CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES* 7 (1986) [hereinafter *CONFRONTING DOMESTIC VIOLENCE*]. Both authors were drawing from a study by M. STRAUS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 32-33 (1980) [hereinafter *BEHIND CLOSED DOORS*].

4. See, e.g., L. WALKER, *THE BATTERED WOMAN* ix (1979) [hereinafter *THE BATTERED*

a drastically under-reported crime.⁵ Often the results of battering become even more serious. In 1973, FBI statistics showed that one-fourth of all murders were within the family and one-half of these were spousal killings.⁶ In 1979, FBI statistics indicated that husbands or boyfriends killed forty per cent of all female homicide victims.⁷ The stories are terrifying,⁸ and the number of studies on the issue are legion.⁹

Clearly, society-at-large does not understand the battered woman, the batterer, and their relationship. This lack of comprehension undercuts society's ability to deal with the legal and moral complexities arising from the abusive relationship. This Article will focus on an important and controversial development in the law affecting battered women. An increasing number of courts admit expert testimony on the battered woman syndrome to support a claim of self-defense when a battered woman kills her abuser. Part II of this Article traces the history of wife abuse, the nature of the battering relationship, and the legal system's response to battering. The next section reviews the law of self-defense and analyzes some of the problems a battered woman encounters when pleading self-defense. Part IV presents the standards courts use in admitting expert testimony generally and, more specifically, on the battered woman syndrome. Such tes-

WOMAN]; Moore, *supra* note 2, at 14; and Straus, *A Sociological Perspective on the Prevention and Treatment of Wifebeating*, in BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 194 (M. Roy ed. 1977).

5. Statistics underestimate the frequency of domestic violence incidents for a number of reasons. *E.g.*, CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 5-7, cites official reporting and record-keeping methods as major contributors to the under-reporting problems. D. MARTIN, *supra* note 2, at 15-17, calls wife abuse a "skeleton in the closet." She believes that society itself—the media, social scientists, social services, reformers, the police, the neighbors, the battered woman and her family—all conspire to keep the battering issue out of the public eye. *Id.*

6. Statistic cited in J. FLEMING, *supra* note 2, at 332. Other studies confirm these findings. Several are cited in R. DOBASH & R. DOBASH, VIOLENCE AGAINST WIVES 15-19 (1979) [hereinafter R. DOBASH].

7. See FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1979 10-11 (1980), cited in Waits, *supra* note 3, at 274 n.21. Accord Wolfgang, *A Sociological Analysis of Criminal Homicide*, in STUDIES IN HOMICIDE 15, 23 (M. Wolfgang ed. 1967), cited in Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 626 n.14 (1980).

8. See, *e.g.*, the stories detailed in A. BROWNE, WHEN BATTERED WOMEN KILL 55-74 (1987) and THE BATTERED WOMAN, *supra* note 4, at 78-184. Victim quotes were also used extensively in R. DOBASH, *supra* note 6, at 75-222.

9. See, *e.g.*, L. WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter THE BATTERED WOMAN SYNDROME] (a study of over 400 battered women); THE DARK SIDE OF FAMILIES (1983) (contains several studies on many aspects of family violence); THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING (M. Roy ed. 1982) (contains several studies, surveys and presentations of treatment programs); BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE, *supra* note 4 (consists entirely of studies).

timony can be, of course, a key factor in a battered woman's proof of a self-defense claim to a homicide charge. The conclusion then summarizes the findings and issues discussed in previous sections and makes recommendations designed to mitigate the legal problems this deadly phenomenon presents.

II. THE PROBLEMS WITH THE BATTERED WOMAN

The battered woman presents a 'problem' for society because almost no one (including the abused woman herself) can understand why a mature adult simply does not walk away from an abusive relationship, call the police when she was attacked, or tell family, friends, and neighbors about the problem and seek their assistance. The answer is complex, as this section will illustrate.

A. History

Wife beating has been a fact of life for centuries. Only in pre-Biblical times were women sovereign (due to their child-bearing capabilities) and thus not subject to abuse. Religions revolved around female deities and the mother figure.¹⁰ Once men began to realize their importance in procreation, however, society moved from a matriarchal to a patriarchal orientation.¹¹ Ancient myths¹² and Old Testament Bible passages¹³ illustrate this shift in attitude. By the Middle Ages wife beating was not only a well-established practice, but encouraged.¹⁴ Later, the Napoleonic Civil Code and the English common law also reflected this perspective. Under Napoleonic rule, women lost all property rights and were 'owned' by their fathers or their husbands.¹⁵ The English common law contained the infamous 'rule of thumb' that purported to protect wives by limiting the size

10. See R. GRAVES, *THE GREEK MYTHS* 11-20 (1957) and Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE*, at 2, 4 (M. Roy ed. 1977). For another excellent discussion of the history wife beating see R. DOBASH, *supra* note 6, at 31-74.

11. Davidson, *supra* note 10, at 5; R. GRAVES, *supra* note 10, at 11-23.

12. R. GRAVES, *supra* note 10, at 11-23.

13. *Genesis* 3:1-17 (The woman's temptation to eat from the tree ultimately caused the fall of man); *Deuteronomy* 25:11-12 (Under the miscellaneous laws, woman's hand was cut off, if upon rescue of her husband in a fight with another man, she seized the opponent's genitals); *Deuteronomy* 22:13-21 (Under the marriage laws, if a woman could not prove her virginity, she was stoned to death); *Judges* 19 (In a particularly vicious story, a husband offered his concubine to a gang of rapists to spare his own life. The gang eventually killed her. The husband sought revenge, but no fault is ascribed to him in the story, nor is any compassion expressed for the woman.).

14. Davidson, *supra* note 10, at 12-14.

15. *Id.* at 15.

of the instrument that a husband could use to chastise his wife to a "rod not thicker than his thumb."¹⁶ The United States eventually adopted the English common law view,¹⁷ but by the late 1800s several states began to withdraw a husband's right to beat his wife.¹⁸

Only recently has there been any sort of concerted public effort to help battered women. British author and activist Erin Pizzey established the first shelter for battered women in England in 1971.¹⁹ Pizzey was among the first to bring the battered woman's plight to public attention.²⁰ The concept of a safe house or shelter spread throughout Europe and the United States, and every shelter that has opened since has quickly filled to capacity.²¹ The battered women's movement really did not achieve momentum in the United States until the mid-1970s when the National Organization for Women established a Task Force on Battered Women and Household Violence, and shelters and coalitions began springing up across the country.²² The battle, however, was only beginning.

B. *The Abusive Relationship*

Today, largely through the pioneering efforts of Del Martin,²³ Lenore Walker,²⁴ and others, much is known about the parties involved in an abusive relationship, the dynamics of the relationship, and the nature of the abuse itself. This section will summarize some of the findings and theories about domestic abuse.

The Parties. The 'typical' batterer and his victim defy neat categorization. Wife abuse cuts across all social, economic, religious, racial, and ethnic lines according to official records and unofficial studies.²⁵ The poor

16. *Id.* at 18; BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND 445-46 (1765).

17. Mississippi was the first state formally to recognize the husband's right to beat his wife in *Bradley v. State*, 1 Miss. (1 Walker) 156 (1824). In *State v. Rhodes*, 61 N.C. (Phil. Law) 445 (1868), the court did not punish the husband because he used a switch smaller than his thumb and because the court wanted to avoid interfering with the family relationship. In *Abbott v. Abbott*, 67 Me. 304 (1877), the court stated that a woman could not sue her husband for an assault committed during the marriage.

18. See, e.g., *Commonwealth v. McAfee*, 108 Mass. 458 (1871); *Fulgham v. State*, 46 Ala. 143 (1871); *State v. Oliver*, 70 N.C. 453 (1874); *Gorman v. State*, 42 Tex. 221 (1875).

19. THE BATTERED WOMAN, *supra* note 4, at 192; D. MARTIN, *supra* note 2, at 6.

20. D. MARTIN, *supra* note 2, at 6; Waits, *supra* note 3, at 268 n.2. Pizzey wrote an early and well-known book on the subject of battering, E. PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1974).

21. THE BATTERED WOMAN, *supra* note 4, at 192.

22. S. SCHECHTER, WOMEN AND MALE VIOLENCE 1-2, 53-58 (1982); D. MARTIN, *supra* note 2, at 7.

23. See D. MARTIN, *supra* note 2.

24. See THE BATTERED WOMAN, *supra* note 4.

25. See *id.* at 21-23; Moore, *supra* note 2, at 15-16.

may be overrepresented in police, hospital, and social service records, but this imbalance is due to a lack of alternative support services and resources for the poor. A battered middle class woman has the option of going to a private physician or counselor.²⁶ Researchers, however, have some general conclusions about the characteristics of the abuser and the victim.

Generally authorities agree that, except in a very rare case, the spouse abuser is not a psychopath—he knows what he is doing.²⁷ As a group, batterers have low self-esteem²⁸ and have a traditional or conservative view of male and female roles in society and in the family structure.²⁹ Studies have found that a very high percentage of men who abuse their wives were either themselves abused, or, as children, witnessed the abuse of their mothers.³⁰ The role of alcohol in the spousal abuse relationship is not clear, but some studies show a link between alcohol problems and battering.³¹ A batterer tends to exhibit pathologically jealous

26. Moore, *supra* note 2, at 15-16. D. MARTIN, *supra* note 2, at 15-16, points out that middle class society—the media, authors, therapists and social scientists included—deliberately avoid acknowledging violence in the family. *Id.*

27. THE BATTERED WOMAN, *supra* note 4, at 26; Moore *supra* note 4, at 15; Straus, *supra* note 4, at 194-95. Some studies, however, have attempted a connection between abusive behavior and various idiosyncratic factors. See, e.g., Schauss, *Effects of Environmental and Nutritional Factors on Potential and Actual Batterers*, in THE ABUSIVE PARTNER: ANALYSIS OF DOMESTIC BATTERING 76-90 (M. Roy ed. 1982); Elliott, *The Neurology of Explosive Rage: The Dyscontrol Syndrome in BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE* 98-109 (M. Roy ed. 1977).

28. THE BATTERED WOMAN, *supra* note 4, at 36; Moore, *supra* note 4, at 15.

29. THE BATTERED WOMAN, *supra* note 4, at 36; Moore, *supra* note 4, at 15. Some authors indicate that such a traditional man is more likely to be threatened and then subsequently beat his spouse if she earns more money than he does, or if she has more status in society. Moore, *supra* note 4, at 17; Prescott & Letko, *Battered Women: A Sociopsychological Perspective*, in BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 72, 74-76 (M. Roy ed. 1977) [hereinafter Prescott].

30. Lenore Walker, in a study of over 400 battered women, found that battering was present in 80% of the batterer's homes. THE BATTERED WOMAN SYNDROME, *supra* note 9, at 149. Maria Roy, in a study of 4000 cases, found that 80% of the abusers had experienced childhood abuse or witnessed the abuse of their mothers. Roy, *Four Thousand Partners in Violence: A Trend Analysis*, in THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING, 17, 34 (M. Roy ed. 1982). See also Fitch & Papatonio, *Men Who Batter: Some Pertinent Characteristics*, 171 J. OF NERVOUS & MENTAL DISEASE 190, 191 (1983) [hereinafter Fitch], (71% of sample saw or heard violence between parents, 49% were themselves abused).

31. For example, in Lenore Walker's recent study, 67% of the batterers abused alcohol, but not always during the battering incidents. On the other hand, the alcohol abusers inflicted more serious injuries on women. THE BATTERED WOMAN SYNDROME, *supra* note 9, at 150. Maria Roy found a 35% rate of alcohol abuse among the batterers in her study. Roy, *supra* note 30, at 35. A wide variety of studies are cited in Powers & Kutash, *Alcohol, Drugs and Partner Abuse*, in THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING 39, 39-

behavior,³² often accusing his wife of sexual affairs or by attempting to restrict her activity so severely that infidelity would be impossible.³³ Finally, an important characteristic of the abusive spouse is his refusal to take responsibility for his actions. He tends to put the blame on his victim, claiming that she provoked him in some way.³⁴

The woman involved in an abusive relationship resembles her partner in that she is likely to suffer from low self-esteem and to have a traditional view of male-female roles in society.³⁵ Otherwise, as previously indicated, any woman can be a battered woman.

The Dynamics of the Relationship. A few common themes emerge when the causes of marital violence are examined. Many authors point out that societal and cultural perspectives of women and marriage have, at least historically, made a "marriage license a hitting license."³⁶ Other commentators point to sex role socialization generally. Traditionally, our society expects men to be strong and aggressive and women to be weak

40, 42 (M. Roy ed. 1982). The percentage estimates for alcohol abuse among batterers range from 53% to 87%. Alcohol use, however, also may be viewed by both parties to a battering relationship as an excuse for the behavior. Of course, not all alcoholics beat their wives. See, e.g., *THE BATTERED WOMAN*, *supra* note 4, at 25; Moore, *supra* note 4, at 18-19.

32. This extreme jealousy is frequently mentioned in the literature, A. BROWNE, *supra* note 8, at 44; *THE BATTERED WOMAN SYNDROME*, *supra* note 9, at 149; R. DOBASH, *supra*, note 6, at 98, 99; *THE BATTERED WOMAN*, *supra* note 4, at 37-38; Moore, *supra* note 2, at 16. This jealousy is documented in the cases as well. See, e.g., *State v. Gallegos*, 104 N.M. 247, 719 P.2d 1268 (1986); *People v. Emick*, 103 A.D.2d 643, 481 N.Y.S.2d 552 (1984); *People v. Bush*, 84 Cal. App. 3d 294, 148 Cal. Rptr. 430 (1978).

33. Walker details this sexual jealousy in her chapter on sexual abuse. *THE BATTERED WOMAN*, *supra* note 4, at 114-17. See also R. DOBASH, *supra* note 6, at 98-99. In one case, the man glued the trailer door shut when he was gone, so that the woman could not leave or have visitors. *People v. Emick*, 481 N.Y.S.2d at 556.

34. Adams & McCormick, *Men Unlearning Violence: A Group Approach Based On The Collective Model*, in *THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING* 170, 178 (M. Roy ed. 1982). Authorities also indicate that not only do these men blame their wives for their behavior, but the wives accept the blame. *THE BATTERED WOMAN*, *supra* note 4, at 31, 36; R. DOBASH, *supra* note 6, at 96.

35. *THE BATTERED WOMAN*, *supra* note 4, at 34; Moore, *supra* note 4, at 20. Walker found in a subsequent study, however, that the women did not perceive themselves as having low self-esteem and that they had a fairly liberal view of women's roles in society. *THE BATTERED WOMAN SYNDROME*, *supra* note 9, at 148, 151.

36. Straus, *supra* note 4, at 195-97. Straus also cites some frequently used jokes and the ditty:

A woman, a horse, and a hickery tree

The more you beat 'em the better they be

as evidence of societal acceptance of marital violence. *Id.* Del Martin presents marriage and the laws governing the marital relationship as a severe detriment to a woman in all areas: legal, financial, sexual, even mental and physical health. Martin, *What Keeps a Woman Captive in a Violent Relationship? The Social Context of Battering*, in *BATTERED WOMEN* 33, 42-46 (D. Moore ed. 1979).

and passive.³⁷ This expectation carries over into the marriage relationship and affects the way law enforcement officials, friends, family, counselors, and even the parties themselves view battering. Violence in the family can also be seen as a means of getting and keeping power or control. The perpetrator resorts to violence because of his self-perceived lack of power.³⁸ Finally, the 'subculture of violence' in our society is widely condemned but listed as a major contributor to family violence.³⁹ Violence in the media, guns in the home,⁴⁰ pornography,⁴¹ and physical punishment of children⁴² exemplify our overall tolerance for violence.

More specific and direct causation factors are perhaps more useful for the purposes of this article. Traditionally, therapists, law enforcement officials, and others dealing with violence in the home blamed the woman for the man's battering. They reasoned that she must have provoked him in some way.⁴³ This theory, however, has been discredited.⁴⁴ In some cases attacks begin when the woman challenges or defies her abuser, but this is by no means universal.⁴⁵ Some writers connect economic factors with battering behavior. Battering may increase during times of financial hardship or when a man is dissatisfied with his job or level of career success.⁴⁶ This theory is also disputed.⁴⁷ Battered women claim that they fre-

37. Wardell, Gillespie & Leffler, *Science and Violence Against Wives*, in *THE DARK SIDE OF FAMILIES* 69, 72-73 (1983) [hereinafter Wardell]. This Article, however, criticizes the socialization approach. See also Couch, *Research on Wife Abuse: A Scan of the Literature*, in *ABUSE OF WOMEN: LEGISLATION, REPORTING AND PREVENTION* 1, 4-5 (J. Costa ed. 1983) (Couch also criticizes this approach); Martin, *supra* note 36, at 41-42. But see Straus, *supra* note 4, at 195. (Straus would attribute very few wifebeatings to cultural factors).

38. Finkelhor, *Common Features of Family Abuse*, in *THE DARK SIDE OF FAMILIES* 17, 18-19 (1983).

39. Murray Straus, a leading author in the area of family violence, is particularly concerned about society's encouragement of violence generally. Straus, *Ordinary Violence, Child Abuse and Wifebeating: What Do They Have in Common?*, in *THE DARK SIDE OF FAMILIES* 213, 229-33 (1983) [hereinafter *Ordinary Violence*]; R. DOBASH, *supra* note 6, at 21-23; Straus, *supra* note 4, at 199-200.

40. Straus, *supra* note 4, at 200-02.

41. Patai, *Pornography and Woman Battering: Dynamic Similarities*, in *THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING* 91, 91-99 (M. Roy ed. 1982); *THE BATTERED WOMAN*, *supra* note 4, at 126.

42. *THE BATTERED WOMAN SYNDROME*, *supra* note 9, at 37; *Ordinary Violence*, *supra* note 39, at 232; Straus, *supra* note 4, at 202-03.

43. Provocation was an extremely popular theory. Wardell, *supra* note 37, at 73-75; Couch, *supra* note 37, at 4; S. SCHECHTER, *supra* note 22, at 20-24; R. DOBASH, *supra* note 6, at 102-03; D. MARTIN, *supra* note 2, at 49.

44. See, e.g., Wardell, *supra* note 37, at 74-75; R. DOBASH, *supra* note 6, at 134-37.

45. R. DOBASH, *supra* note 6, at 100-03. Of course, this challenge does not excuse a beating in any event. Wives, however, may deliberately provoke a beating in order to get it over with. *THE BATTERED WOMAN*, *supra* note 4, at 60.

46. See Roy, *supra* note 30, at 31, 33; Prescott, *supra* note 29, at 88-89.

47. See *THE BATTERED WOMAN SYNDROME*, *supra* note 9, at 148 (85% of men involved in

quently are beaten while pregnant. Authorities believe that a batterer, who is usually insecure and very dependent on his wife, feels threatened by or is jealous of the pending arrival of a child.⁴⁸ In any event, there is no clear-cut cause for battering. Just as the batterer himself is hard to classify, the reasons for his behavior are difficult to delineate.⁴⁹

Similarly, the reasons why the battered woman remains in her tormented situation provoke theories but defy analysis.⁵⁰ Commentators have mentioned that some women blame themselves for their partner's abusive behavior, feel they deserve it, or consider it to be his "right."⁵¹ Most women, however, have other reasons for staying with a batterer. Financial dependence is considered a major factor, particularly when the parties have children.⁵² A woman may fear that if she leaves her children with the batterer, she will be accused of desertion and eventually will lose custody of the children.⁵³ Moreover, studies have shown a high correlation between spouse abuse and child abuse.⁵⁴ Some women may be concerned about the social stigma of a divorce⁵⁵ or may feel too humiliated to tell anyone about their situation.⁵⁶ Many women hope that the batterer will mend his ways and stop the beatings (since he frequently promises to do so).⁵⁷ Women stay with men who abuse them for a myriad of reasons, but

the study were employed); Fitch, *supra* note 30, at 190-91; Straus, *supra* note 4, at 196.

48. THE BATTERED WOMAN SYNDROME, *supra* note 9, at 149; Roy, *supra* note 30, at 33; J. FLEMING, *supra* note 2, at 272.

49. Authors make this point in a variety of ways. Wardell, *supra* note 37, at 72-77 discusses and rejects several theories of wife abuse, arguing that the traditional theories are permeated with sexist notions that limit their usefulness. *Id.* A similar approach is taken in Couch, *supra* note 37, at 4-6. *Ordinary Violence*, *supra* note 39, at 229-30 shows a graph of 26 factors affecting wife abuse.

50. Also, as R. Dobash & R. Dobash point out, the battered woman frequently does leave, but with varying intentions about the permanency of her act. R. DOBASH, *supra* note 6, at 144.

51. See *supra* notes 14-17 and accompanying text.

52. See S. SCHECHTER, *supra* note 22, at 55-56; Moore, *supra* note 2, at 20-22; Roy, A *Current Survey of 150 Cases*, in BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 25, 31 (M. Roy ed. 1977); D. MARTIN, *supra* note 2, at 83-84. In THE BATTERED WOMAN, *supra* note 4, at 127-44, the author presents economic deprivation as a form of spouse abuse. She also illustrates how some women would leave their abusers when they saved up enough money to do so. Accord, J. FLEMING, *supra* note 2, at 84.

53. See A. BROWNE, *supra* note 8, at 111-13; THE BATTERED WOMAN SYNDROME, *supra* note 9, at 146-46; LEGAL RIGHTS OF BATTERED WOMAN, Handbook published by La Casa De Las Madres in San Francisco, reprinted in BATTERED WOMEN, *supra* note 2; E. PIZZEY, *supra* note 20, at 122-26.

54. See A. BROWNE, *supra* note 8, at 94; THE BATTERED WOMAN SYNDROME, *supra* note 9, at 149; J. FLEMING, *supra* note 2, at 272-73; D. MARTIN, *supra* note 2, at 22-24.

55. See Moore, *supra* note 2, at 23; D. MARTIN, *supra* note 2, at 81.

56. See Moore, *supra* note 2, at 24; D. MARTIN, *supra* note 2, at 82-83.

57. Geller, *Conjoint Therapy: Staff Training and Treatment of the Abuser and the Abused*, in THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING 198, 198-99 (M.

a major factor (surprisingly) is that many of these women love their men, are loyal to them, and believe that their spouses need them.⁵⁸

Lenore Walker's cycle theory of violence, which is a well-known explanation of the battering relationship, supports this last theory.⁵⁹ According to Walker, the parties continuously go through a cycle consisting of three phases. The first is called the tension-building phase and is characterized by minor battering incidents which gradually escalate over time.⁶⁰ The wife remains passive, yet attempts to control or limit the batterer's abusive behavior. To a certain extent, she can succeed during this phase.⁶¹ This period is usually the longest in the cycle.⁶² The second and shortest phase is the acute battering incident.⁶³ This is a serious, severe beating characterized by the batterer's lack of control during the beating and the lack of predictability about when it will occur.⁶⁴ The last phase is the 'reward' phase, consisting of kindness and contrite loving behavior. The batterer is apologetic, generous, and kind during this phase.⁶⁵ The woman usually wants to believe her man responds to her.⁶⁶ Walker later found that many couples did go through this cycle, but that this third phase tended to become shorter and the first phase longer over the course of the relationship.⁶⁷

Two other psychological theories are thought to play a role in the dynamics of a violent relationship. The first, intermittent reinforcement, posits that when a certain behavior is reinforced at irregular intervals, it

Roy ed. 1982). See Moore, *supra* note 2, at 23; Roy, *supra* note 30, at 32; D. MARTIN, *supra* note 2, at 79. In fact, this promise of reform is part of the whole basis of the Walker Cycle theory of violence, discussed *infra* notes 59-64 and accompanying text.

58. A. BROWNE, *supra* note 8, at 141-42. A recent study of women who killed their abusing spouse found that shock, horror, and grief filled many of the women when they realized their husband was dead. *Id.* See THE BATTERED WOMAN, *supra* note 4, at 67-69; Moore, *supra* note 2, at 23; D. MARTIN, *supra* note 2, at 82.

59. The cycle of theory of violence is presented in THE BATTERED WOMAN, *supra* note 4, at 55-70.

60. *Id.* at 56-59.

61. *Id.* at 56. Walker states that this passivity is combined with rationalizations for the abusive behavior, denial of the seriousness of the situation, and anger. *Id.* at 56-57.

62. *Id.* at 58. Walker gives an example of a 10-year tension-building phase. *Id.*

63. *Id.* at 60. Walker indicates that the duration usually ranges from two to twenty-four hours. *Id.*

64. *Id.* at 59-61.

65. *Id.* at 65-66. The man may present his wife with expensive gifts, apologize profusely, and promise that the battering will cease. *Id.* This general pattern of violence, particularly the contrition phase, was also documented in A. BROWNE, *supra* note 8, at 62-65.

66. THE BATTERED WOMAN, *supra* note 4, at 66-69. Walker notes that this is the time that battered women will often leave their abusers, and yet they are still vulnerable to these manipulations, much to the frustration of police, counselors and friends. *Id.*

67. Walker, *The Battered Woman Syndrome Study*, in THE DARK SIDE OF FAMILIES 31, 43-44 (1983).

becomes very difficult to stop or to modify.⁶⁸ Similarly, abusive men are not constantly abusive; their relationships with their families usually have some happy periods. This makes it difficult for a woman to leave her abuser. Second, psychologists have discovered a phenomenon known as learned helplessness. If animals (or humans) continuously experience situations in which they have no control over outcomes, the experience impairs their ability to respond in a situation in which they could have some control.⁶⁹ Some believe that at least a few battered women lose their ability to 'save' themselves because they feel they have no control over the battering situation. One author compared battered women to prisoners of war or other victims of severe physical and emotional trauma. They suffer from shock and denial and are unable to realistically assess their danger. They may become passive, withdrawn, and may fail to take advantage of escape opportunities when presented.⁷⁰

Finally, there is the important element of fear. Many women fear that if they do leave, their abuser will track them down and beat them even more severely or possibly kill them.⁷¹ A batterer is often afraid that his wife will leave him, so he makes ugly threats against her, her children, or her family in an effort to frighten her into staying.⁷² On a more basic

68. See Geller, *supra* note 57, at 199.

69. THE BATTERED WOMAN, *supra* note 4, at 42-54. Walker discusses some interesting animal studies involving the learned helplessness phenomenon. For example, when dogs received electrical shocks at random, varied intervals, the dogs found that they could not control the pain. In order to retrain the dogs to voluntarily avoid the shocks, the researchers had to drag the dogs out of their cages repeatedly until they learned to escape on their own. *Id.* at 46. In another experiment, researchers held baby rats in their hands until all escape movements ceased then the researchers released them. They repeated the procedure several times. Then they placed the rats in a vat of water. The "treated" rats drowned within 30 minutes. However, "untreated" rats could swim up to 60 hours before they drowned. *Id.* at 46-47. But see Wardell, *supra* note 37, at 76-77 (rejecting the theory).

70. A. BROWNE, *supra* note 8, at 122-27.

71. In her recent study of battered women who killed their abusers, Angela Browne found that fear was a reaction experienced by several of the women immediately after the death. They could not believe that their attacker was dead and they continued to attempt to 'hide' from him. A. BROWNE, *supra* note 8, at 141. Angela Browne estimates that as many as 50% of abused women who leave their spouses are later followed, harassed, and attacked by their spouses. *Id.* at 110. In some cases in which women have killed their abusers, the death occurred after the man had tracked 'his' woman down after she had left him. See *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985); *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312 (1984). See also S. SCHECHTER, *supra* note 22, at 19 (woman confronts fear of retaliation, and may be advised to hide out); Moore, *supra* note 2, at 22 (husbands frequently will track down and terrorize wives); D. MARTIN, *supra* note 2, at 76-79 (examples of women whose spouses stalked them, sometimes for years).

72. See A. BROWNE, *supra* note 8, at 65; THE BATTERED WOMAN SYNDROME, *supra* note 9, at 42-43; *State v. Hundley*, 693 P.2d at 477; *People v. Emick*, 103 A.D.2d 643, 481 N.Y.S.2d 552, 558 (1984).

level, a battered woman is simply afraid of the unknown—the outside world. She is concerned about supporting herself and her children; she worries about leaving the security (such as it is) of her present life style.⁷³

The Nature of the Abuse. Abuse of women by their male partners takes a variety of forms. Of course, the most serious form of battering is physical abuse, which can range from the fairly minor (slapping, pushing, shoving) to the very serious (punching, kicking, choking, throwing, use of objects to beat, or use of weapons).⁷⁴ Most abusers do not use weapons; they use their hands, fists, or feet to physically assault their wives.⁷⁵ Bruises are the most commonly reported injuries,⁷⁶ but broken bones and other severe injuries are far from rare.⁷⁷

A related form of physical battering is sexual abuse. The examples of this form of abuse range from marital rape, or sodomy, to forced sex with objects, animals, or third parties.⁷⁸ This form of abuse is particularly devastating within the context of the battering relationship since many women report that sexual relations with their partners can also be normal, happy, and good.⁷⁹

Physical battering is often combined with other forms of abusive behavior. Women frequently cite economic deprivation in battering rela-

73. S. SCHECHTER, *supra* note 22, at 19; Moore, *supra* note 2, at 22; R. DOBASH, *supra* note 6, at 146-47.

74. See Roy, *supra* note 30, at 27 (physical abuse present in 60.8% of the cases); THE BATTERED WOMAN, *supra* note 4, at 79 (summary of major and minor forms of physical abuse); R. DOBASH, *supra*, note 6, at 106-07 (descriptions of various forms of physical violence from several studies). The variety of forms of abuse is without limit. In *State v. Hundley*, 693 P.2d at 476, the husband would dilute his diabetic wife's insulin with water. *Id.*

75. Roy, *supra* note 30, at 27, 34; R. DOBASH, *supra* note 6, at 248 (Table 7). In fact, one author indicates that abusive men may aim their blows at places on the woman's body where injuries will not show: the torso, or the top of the head. D. MARTIN, *supra* note 2, at 49.

76. See Roy, *supra* note 30, at 27, (49.8% of injuries are bruises); R. DOBASH, *supra* note 6, at 248 (Table 8) (70% of injuries are bruises).

77. See, e.g., M. SCHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST WOMEN IN KENTUCKY 1 (1981), cited in Waits, *supra* note 3, at 274 (five to ten percent of abused women do report severe abuse or use of a weapon); Roy, *supra* note 30, at 27 (9% broken limbs); THE BATTERED WOMAN, *supra* note 4, at 79-80 (broken ribs and arms, caused by the woman raising her arms to defend herself, are the most common broken bones, other serious injuries cited); R. DOBASH, *supra* note 6, at 248 (Table 8) (other injuries include cuts, burns, broken bones, internal injuries and being knocked unconscious).

78. Walker and Browne found that marital rape was fairly common in abusive relationships. THE BATTERED WOMAN SYNDROME, *supra* note 9, at 149; A. BROWNE, *supra* note 8, at 95-103. See also S. SCHECHTER, *supra* note 22, at 17. But see Roy, *supra* note 30, at 27 (only 2.2% of assaults were sexual abuse). In Walker's chapter on sexual abuse in her first book, Walker discusses some of the forced perverse sexual practices. THE BATTERED WOMAN, *supra* note 4, at 118-24.

79. THE BATTERED WOMAN, *supra* note 4, at 108-13.

tionships. The husband will not give his wife any money without her 'justifying' it, or he will direct her to pay the bills and run the household without giving her adequate funds to do so. This form of abuse goes beyond mere economic dependence into a more sinister means of control by a man over his woman.⁸⁰ Verbal battering, such as name calling or critical, derogatory remarks and comments designed to humiliate a woman, can shatter her sense of self-worth as well as become a source of great anger for her.⁸¹ Deliberate social isolation is another coercive technique batterers employ. This can range from outright selection of a woman's friends,⁸² locking her up in the house, making sure she never goes out alone,⁸³ to more subtle manipulative behavior. For example, some men will refuse to escort their wives to social or family events, or if they do go, they may pick a fight or begin verbal abuse of their wives or of other people present.⁸⁴ Of course, it is important to note that the coercive power of the economic deprivation, verbal abuse, or social isolation comes from both parties' knowledge that if the woman does not passively accept much of this behavior, the man is likely to explode and physically assault her.⁸⁵

C. *The Legal System's Response to Battering*

The criminal justice system's response (or lack thereof) to the predicament of the battered woman is, as one author puts it, merely a reflection of the views of society.⁸⁶ If society accepts wife beating as normal or permissible behavior, nothing will be done to stop it. When society's attitude changes, the criminal justice system will also change.

Traditional Responses. The police are the most important link to the legal system for the battered woman. One author aptly calls police the

80. See *id.* at 127-44; R. DOBASH, *supra* note at 6, at 128-29.

81. See S. SCHECHTER, *supra* note 22, at 17; THE BATTERED WOMAN, *supra* note 4, at 172-74.

82. A batterer may also try to isolate his wife from her family. See Waits, *supra* note 3, at 287; THE BATTERED WOMAN, *supra* note 4, at 169; R. DOBASH, *supra* note 6, at 132. These attempts at isolation are also often attributed to the abuser's extreme jealousy. See *supra* notes 32-33 and accompanying text.

83. See, e.g., A. BROWNE, *supra* note 8, at 43; R. DOBASH, *supra* note 6, at 129-31; D. MARTIN, *supra* note 2, at 83-84.

84. See THE BATTERED WOMAN, *supra* note 4, at 169-72; R. DOBASH, *supra* note 6, at 114-15.

85. See S. SCHECHTER, *supra* note 22, at 17; THE BATTERED WOMAN, *supra* note 4, at 166-67.

86. Paterson, *How the Legal System Responds to Battered Women*, in BATTERED WOMEN 79, 80 (D. Moore ed. 1979).

'gatekeepers' of the system.⁸⁷ The police are available twenty-four hours a day, are usually a battered woman's first contact with the legal system, and the very act of calling them is often a battered woman's desperate cry for help.⁸⁸

Traditionally, the police were ineffective (or worse) in their response to domestic violence calls. For example, one widely-cited 1976 study from Kansas City, Missouri, indicated that ninety percent of the city's family homicides were preceded by at least one call to the police, while five or more calls preceded fifty percent of the cases.⁸⁹ Police are reluctant to deal with a battering situation for a variety of reasons. First, domestic disputes are dangerous for officers to handle. Studies show that between twenty and thirty-three percent of police officer assaults or homicides occur when officers respond to domestic disturbance calls.⁹⁰ Second, the officers may have certain attitudes or beliefs about domestic violence that are reinforced through their training programs.⁹¹ Many people (including police officers) believe some of the outdated myths about the battered woman, for example, that she enjoys being beaten, that she provoked the beatings,⁹² or that a husband has the intrinsic right to slap his wife

87. CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 29.

88. *See id.*; Martin, *supra* note 36, at 48.

89. *See* Moore, *supra* note 2, at 13.

90. Several studies are cited in Stephens, *Domestic Assault: The Police Response*, in BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 164 (M. Roy ed. 1977) and in J. FLEMING, *supra* note 2, at 173.

91. *E.g.* in S. SCHECHTER, *supra* note 22, at 157, a widely reported Michigan Police Training Academy procedure is presented:

- a. Avoid arrest if possible. Appeal to their vanity.
- b. Explain the procedure of obtaining a warrant.
 1. Complainant must sign complaint.
 2. Must appear in court.
 3. Consider loss of time.
 4. Cost of court.
- c. State that your only interest is to prevent a breach of the peace.
- d. Explain that attitudes usually change by court time.
- e. Recommend a postponement.
 1. Court not in session.
 2. No judge available.
- f. Don't be too harsh or critical.

D. MARTIN, *supra* note 2, at 93-99 cites an explicit nonarrest policy from the Oakland, California police department: "Normally, officers should adhere to the policy that arrests shall be avoided except as necessary to (1) preserve life and property and (2) preserve the peace." The manual goes on to advise the officer to discourage a party demanding an arrest and to encourage the parties to reason with each other. *See also* J. FLEMING, *supra* note 2, at 174, in which a widely used training guide urges the officer to "act on his instinct" in assessing a domestic incident. *Id.*

92. *See* THE BATTERED WOMAN, *supra* note 4, at 20, 29. *See also supra* notes 43-45 and accompanying text.

around if she gets out of line.⁹³ Tales abound too of an extremely strong and somewhat puzzling concern on the part of police officers for the batterer. Officers worry that the batterer will get into trouble or 'lose face' if he is arrested. This phenomenon may be attributable to sexist attitudes combined with a belief in the myths about battered women as well as a concern for family privacy.⁹⁴ Third, until recently many police departments encouraged their officers to mediate domestic disputes but not to arrest a batterer.⁹⁵ Fourth, past legislation supporting police action was ineffective. For example, temporary restraining orders were often only available to women who were already in the process of getting a divorce. Moreover, officers could not make an arrest unless a felony was committed or unless the officers actually witnessed a misdemeanor.⁹⁶ Finally, even when the police did act, prosecutors and judges often failed to follow through with vigorous prosecution and appropriate punishment of the offender.

The criminal justice system has stubbornly refused to recognize wife abuse as a crime.⁹⁷ Generally, prosecutors and judges also believe the myths that surround the battered woman. Thus, prosecutors are reluctant to pursue spousal abuse cases since they often present evidentiary problems,⁹⁸ the victim may change her mind,⁹⁹ and even if the case does come to trial, there is little chance of a conviction or a serious sanction against the offender.¹⁰⁰ Both district attorneys and judges may urge the

93. An often cited statistic comes from a Harris poll, in which 20% of the Americans surveyed approved of hitting one's spouse on 'appropriate' occasions. Stephens, *supra* note 90, at 164. In *BEHIND CLOSED DOORS*, *supra* note 4, at 47, the authors found that 28% of the men and over 23% of the women in their study thought that slapping a spouse around was 'normal' behavior.

94. S. SCHECHTER, *supra* note 22, at 158-59; *THE BATTERED WOMAN*, *supra* note 4, at 207; Paterson, *supra* note 86, at 85; D. MARTIN, *supra* note 2, at 96-97, 101.

95. See, e.g., Paterson, *supra* note 86, at 82; J. FLEMING, *supra* note 2, at 175. And generally, *supra* note 91.

96. S. SCHECHTER, *supra* note 22, at 159; Paterson, *supra* note 86, at 83-84; D. MARTIN, *supra* note 2, at 90.

97. *CONFRONTING DOMESTIC VIOLENCE*, *supra* note 3, at 55; Paterson, *supra* note 86, at 94-95; D. MARTIN, *supra* note 2, at 117.

98. Frequently in a battering situation, which is an intra-family crime, no witnesses exist (except perhaps children); neither do police reports nor medical reports documenting the injuries. *CONFRONTING DOMESTIC VIOLENCE*, *supra* note 3, at 55; *THE BATTERED WOMAN*, *supra* note 4, at 213.

99. Victim ambivalence is a frequently mentioned concern. See *CONFRONTING DOMESTIC VIOLENCE*, *supra* note 3, at 55; R. DOBASH, *supra* note 6, at 221. Others, however, argue that battered women would follow through more willingly in these cases if they had a better support system in the first place. Waits, *supra* note 3, at 318; *THE BATTERED WOMAN*, *supra* note 4, at 213; Paterson, *supra* note 86, at 94.

100. *CONFRONTING DOMESTIC VIOLENCE*, *supra* note 3, at 55; S. SCHECHTER, *supra* note 22, at 163; R. DOBASH, *supra* note 6, at 220; Paterson, *supra* note 86, at 94. See generally

parties to reconcile¹⁰¹ or may purposely induce delays in an effort to get the parties to 'cool off.'¹⁰² In the event a woman does pursue her claim through the minefield of legal obstacles, the system then may, in effect, put her on trial in an attempt to show that she deserved or provoked the abuse.¹⁰³

Changes in the Legal System. Numerous reform proposals have been presented in recent years, and some have actually been implemented. A number of reforms affect the participants in the criminal justice system itself. A common change is improved education and training for police officers, prosecutors, and judges about the complexities of a battering situation.¹⁰⁴ Other reforms are more specific. For example, some police departments have standardized procedures for dealing with a battering situation.¹⁰⁵ Other police departments have placed an increased emphasis on arresting the batterer,¹⁰⁶ enforcing protection orders, protecting the victim,¹⁰⁷ or improving reporting and data collection.¹⁰⁸ Prosecutors may adopt a 'no drop' policy for domestic abuse cases¹⁰⁹ or set up special units in the office specifically designed to deal with domestic violence cases.¹¹⁰

Legislators have enacted changes geared toward helping the battered woman: "enforcing the victim's rights, increasing her legal options, and protecting her from further assaults."¹¹¹ The area of victim support has

Crites, *A Judicial Guide to Understanding Wife Abuse*, THE JUDGES' J., Summer 1985, at 5. The author cites judicial gender bias, ignorance about the psychosocial nature of battering, and the lack of awareness of the seriousness of the crime as reasons for ineffective judicial response to spouse abuse. *Id.* at 7.

101. S. SCHECHTER, *supra* note 22, at 162; D. MARTIN, *supra* note 2, at 115-16.

102. S. SCHECHTER, *supra* note 22, at 163; R. DOBASH, *supra* note 6, at 218; D. MARTIN, *supra* note 2, at 113.

103. R. DOBASH, *supra* note 6, at 218-19.

104. CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 81-82; Blair, *Making the Legal System Work For Battered Women* in BATTERED WOMEN 101, 115 (D. Moore ed. 1979).

105. CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 30-31. This reform goes hand in hand with the concept of retraining police officers. See S. SCHECHTER, *supra* note 22, at 161; Stephens, *supra* note 90, at 170.

106. CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 29, 32-40; Waits, *supra* note 3, at 309-10, 316-19; S. SCHECHTER, *supra* note 22, at 159.

107. CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 40-43; S. SCHECHTER, *supra* note 22, at 159.

108. CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 43-44; Waits, *supra* note 3, at 319.

109. Many prosecutors also will subpoena the victims if they will not testify voluntarily. CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 73-74; Waits, *supra* note 3, at 322-23.

110. CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 56-58; Paterson, *supra* note 86, at 94.

111. S. SCHECHTER, *supra* note 22, at 159. Schechter discusses several specific legislative

elicited a number of suggested reforms, but these reforms seldom are put into action. A battered woman often needs money, an attorney, a place to go, education or job training, and emotional support through what can be a very difficult period.¹¹² The legal system is changing, and perhaps these reforms will improve the lot of the battered woman. The key to the problem, however, is not in the legal system, but in the interaction between the batterer, the victim, and society itself.

III. THE BATTERED WOMAN AND THE LAW OF SELF-DEFENSE

A. Introduction

In the past, when a battered woman killed or seriously injured her abuser, she frequently would plead mental impairment or insanity as a defense to a criminal charge.¹¹³ This defense, however, often resulted in involuntary commitment to a mental institution.¹¹⁴ In the last decade, many battered women instead have presented a claim of self-defense when charged with the murder or manslaughter of their abusing husband or boyfriend.¹¹⁵ Attempts to use the law of self-defense in the battered

enactments. *Id.* at 159-69. See also Lerman, Landis & Goldzweig, *State Legislation on Domestic Violence*, in *ABUSE OF WOMEN: LEGISLATION, REPORTING AND PREVENTION* 39-47 (J. Costa ed. 1983); Comment, *The Battered Women's Syndrome Defense*, 34 KAN. L. REV. 337, 364-65 (1985). Post arrest restriction of the batterer can be a key element in preserving the victim's safety. See Waits, *supra* note 3, at 320-21.

112. CONFRONTING DOMESTIC VIOLENCE, *supra* note 3, at 68-73; S. SCHECHTER, *supra* note 22, at 165-66; Blair, *supra* note 104, at 112-13; Stephens, *supra* note 90, at 171.

113. See Schneider, *supra* note 7, at 630; Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, in *WOMEN'S SELF DEFENSE CASES* 1, 5 (E. Bochnak ed. 1981); Comment, *Self Defense: Battered Women Syndrome on Trial*, 20 CAL. W. L. REV. 485, 496-97 (1984).

114. Schneider & Jordan, *supra* note 113, at 29. Angela Browne points out some other problems with the use of an insanity or impaired mental state defense. For example, since jurors are extremely suspicious of such claims, the defense must work even harder to establish credibility. A. BROWNE, *supra* note 8, at 176. See also *State v. Hodges*, 239 Kan. 63, 716 P.2d 563, 569-70 (1986) (discussing the inherent difference between a claim of self-defense and insanity plea).

115. See, e.g., *Commonwealth v. Grove*, 526 A.2d 369 (Pa. Super. 1987); *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986); *State v. Gallegos*, 104 N.M. 247, 719 P.2d 1268 (1986); *Terry v. State*, 467 So. 2d 761 (Fla. Dist. Ct. App. 1985); *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985); *People v. Torres*, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (1985); *Felder v. State*, 683 S.W.2d 565 (Tex. Ct. App. 1985); *State v. Nunn*, 356 N.W.2d 601 (Iowa Ct. App. 1984); *State v. Martin*, 666 S.W.2d 895 (Mo. Ct. App. 1984); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984); *People v. Emick*, 103 A.D.2d 643, 481 N.Y.S.2d 552 (1984); *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312 (1984); *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983); *State v. Thomas*, 13 Ohio App. 3d 211, 468 N.E.2d 763 (1983); *State v. Leaphart*, 673 S.W.2d 870 (Tenn. Crim. App. 1983); *Fultz v. State*, 439 N.E.2d 659 (Ind. Ct. App. 1982); *Commonwealth v. Zenyuh*, 307 Pa. Super. 253, 453 A.2d 338 (1982); *Smith v. State*, 247 Ga.

woman's situation, however, have been fraught with legal difficulties. One issue is the use of expert testimony to explain the battered woman syndrome, as discussed in part IV below. The traditional elements of self-defense can present an array of complex and controversial legal hurdles for a battered woman charged with homicide. This section will discuss these problems and pose some solutions.

B. Women and Violent Crime

Sociological scholarship largely ignored the female criminal until the mid- to late 1800s.¹¹⁶ Early theories of female criminality held that women who committed crimes of any sort were biologically or genetically defective¹¹⁷ or were maladjusted and in rebellion against their 'natural' feminine roles.¹¹⁸ These theories persist even in modern literature.¹¹⁹ For example, these beliefs often led to unequal treatment of female offenders in sentencing. Women may be sentenced to longer prison terms than men to 'cure' or rehabilitate these 'sick' and deviant members of the female sex.¹²⁰

The notion of a violent female may particularly threaten society since violence is antithetical to traditional concepts of 'feminine.'¹²¹ As one authority aptly noted, the criminal law and society will more readily excuse a man for killing his wife's paramour than excuse a woman for killing her rapist.¹²² Women, however, do commit crimes, violent and otherwise. In

612, 277 S.E.2d 678 (1981); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980). See also cases cited in Schneider & Jordan, *supra* note 113, at 2-3 n.3.

116. The first work published on the subject was C. LOMBROSO, *THE FEMALE OFFENDER* (1895). Lombroso focused on physical characteristics of the criminal classes, attempting to distinguish the deviant from the normal. See Bower, *Statistics and Theory on Female Crime*, in *WOMEN AND CRIME IN AMERICA* 2 (L. Bower ed. 1981); F. ADLER, *SISTERS IN CRIME* 31-33 (1975).

117. See generally *supra* note 116.

118. The rebellion against a 'natural' feminine role is based on Freudian theory. See Bower, *supra* note 116, at 2; R. SIMON, *WOMEN AND CRIME* 3-5 (1975).

119. See, e.g., sources discussed in Smart, *Criminological Theory: Its Ideology and Implications Concerning Women*, in *WOMEN AND CRIME IN AMERICA* 6, 8-13 (L. Bower ed. 1981); R. SIMON, *supra* note 118, at 7-9.

120. See Smart, *supra* note 119, at 13-16; Temin, *Discriminatory Sentencing of Women Offenders: The Argument for ERA in a Nutshell*, 11 AM. CRIM. L. REV. 355, 358 (1973). See also A. BROWNE, *supra* note 8, at 10-11; accord Schneider & Jordan, *supra* note 113, at 7 (courts are more likely to find women guilty of more serious offenses than men and to sentence women to longer prison terms).

121. A. BROWNE, *supra* note 8, at 176 (women who commit violent acts are seen as more deranged than males who commit similar crimes); Schneider & Jordan, *supra* note 113, at 6 (women criminals are more intrinsically wicked than men); Schneider, *supra* note 7, at 629.

122. Schneider & Jordan, *supra* note 113, at 14-15.

fact, the rate of crimes perpetrated by females appears to be increasing.¹²³ Many authorities attempted to tie the increase in female crimes to the movement for women's liberation.¹²⁴ It appears that although the rate of property crimes committed by women has increased, the rate of violent crimes has remained stable.¹²⁵

A great number of women who commit crimes, including homicide, are the victims of battering. In one study, Lenore Walker found that many female inmates were battered women whose criminal activity occurred at the insistence of their abusive partner. They would steal, for example, in order to avoid a beating.¹²⁶ In 1979, it was estimated that women who killed their 'mates' in self-defense committed 4.8% of all murders.¹²⁷ In 1982, it was estimated that wives killed husbands in 3.4% of all murders.¹²⁸ In one survey of female prisoners in Cook County, forty percent of the offenders were accused of killing a male batterer.¹²⁹

Women do kill men, but these women often claim that they did so only as a last resort in the face of a life-threatening battering situation.¹³⁰ Living with an abusive man is dangerous for a woman.¹³¹ Although researchers have isolated certain factors that influence the lethal potential of the

123. See Steffensmeier, *Crime and the Contemporary Woman: An Analysis of Changing Levels of Female Property Crime 1960-1975*, in *WOMEN AND CRIME IN AMERICA* 39, 51 (L. Bower ed. 1981); Simon, *American Women and Crime*, in *WOMEN AND CRIME IN AMERICA* 37 (L. Bower ed. 1981); F. ADLER, *supra* note 116, at 15.

124. Freda Adler was one of the first authors to propose the connection, arguing that with increased female participation in formerly male activities generally comes increased female participation in crime. F. ADLER, *supra* note 116. See also Buda & Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence*, 23 J. FAM. L. 359, 359-60 (1984); Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 2 (1982) [hereinafter Walker]. Many other authorities, however, dispute the connection, arguing that increased female violence is merely part of a larger societal trend. See Steffensmeier, *supra* note 123, at 52-53; Bower, *supra* note 116, at 4-5.

125. Simon, *supra* note 123, at 37; Steffensmeier, *supra* note 123, at 52; F. ADLER, *supra* note 116, at 16.

126. See *THE BATTERED WOMAN SYNDROME*, *supra* note 9, at 142.

127. See D. SONKIN, D. MARTIN & L. WALKER, *THE MALE BATTERER: A TREATMENT APPROACH* 72 (1985) [hereinafter D. SONKIN] (citing FBI statistics).

128. See U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES* 9 (1982), cited in Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 121 in 3 (1985).

129. See Waits, *supra* note 3, at 274 n.22 (citing *Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry*, 4 HARV. WOMEN'S L.J. 161 (1981)).

130. See A. BROWNE, *supra* note 8, at 145-46; *THE BATTERED WOMAN SYNDROME*, *supra* note 9, at 41. See also *infra* notes 146-50 and accompanying text.

131. Walker indicates that frequency and severity of abuse, as well as the use of weapons in battering escalates over time. *THE BATTERED WOMAN SYNDROME*, *supra* note 9, at 43-44, 150 (citing *Wife Beating: The Silent Crime*, TIME, Sept. 5, 1983, at 23). Estimates show that between 2000 and 4000 women are killed each year as a result of domestic violence. See Waits, *supra* note 3, at 274 n.21. See also *supra* notes 74-78 and accompanying text.

relationship,¹³² most women believe that the possibility of death is ever-present.¹³³ These facts must be considered in a discussion of the self-defense claims of battered women who kill.

C. *The Elements of Self-Defense*

Basically, a person will be justified in using a reasonable amount of force to protect herself from an attack if she reasonably believes that: 1) she is in immediate danger of bodily harm; 2) the force is necessary to avoid the danger; and 3) she is not the aggressor.¹³⁴ There are several legal issues, however, within this definition.

Justification and Excuse. Self-defense is usually a justification for a crime, not merely an excuse. If the defendant can prove the elements of self-defense, then the defendant is completely exonerated.¹³⁵ The common law commanded or authorized certain types of homicides. A person who committed a justifiable homicide was acquitted because of the nature of the murder—it was stamped with the king's seal of approval.¹³⁶ On the other hand, the common law excused, but did not justify, certain other homicides because of some unique characteristics of the defendant.

132. See D. SONKIN, *supra* note 127, at 73-74 (lists such factors as threats to kill, threats with weapons, intoxication and drug use, and frequency and severity of violence as affecting the lethal potential); THE BATTERED WOMAN SYNDROME, *supra* note 9, at 39-44 (lists similar factors, plus isolation, long-term battering history, children and excessive jealousy as "lethality factors"). Angela Browne found similar factors to be relevant in a recent study comparing relationships that resulted in the death of the batterer with nonlethal battering relationships. A. BROWNE, *supra* note 8, at 127-28.

In a striking number of these homicide cases, the victim-abuser was intoxicated. See, e.g., State v. Gallegos, 104 N.M. 247, 719 P.2d 1268, 1272 (1986); State v. Hundley, 236 Kan. 461, 693 P.2d 475, 476 (1985); State v. Kelly, 97 N.J. 178, 478 A.2d 364, 369 (1984); State v. Leidholm, 334 N.W.2d 811, 813-14 (N.D. 1983); Borders v. State, 433 So. 2d 1325, 1326 (Fla. Dist. Ct. App. 1983); Commonwealth v. Zenyuh, 307 Pa. Super. 253, 453 A.2d 338, 339 (Pa. Super. 1982); People v. White, 90 Ill. App. 3d 1067, 414 N.E.2d 196, 198 (1980); People v. Bush, 84 Cal. App. 294, 148 Cal. Rptr. 430, 435 (1978).

133. Browne found that 98% of the abused women that she studied who did kill their spouses and 90% of the women who did not kill their spouses believed that their abuser could or would kill them. A. BROWNE, *supra* note 8, at 113. In Walker's study, 92% of the women surveyed believed that their batterer could or would kill them and 87% believed that if someone died, it would be the woman. THE BATTERED WOMAN SYNDROME, *supra* note 9, at 39.

134. See W. LAFAYE & A. SCOTT, CRIMINAL LAW 454-63 (2d ed. 1986) [hereinafter W. LAFAYE]; R. PERKINS & R. BOYCE, CRIMINAL LAW 1113-16 (3d ed. 1982) [hereinafter R. PERKINS].

135. See, e.g., R. PERKINS, *supra* note 134, at 1123-26; Crocker, *supra* note 128, at 130-31; Buda & Butler, *supra* note 124, at 373; Schneider & Jordan, *supra* note 113, at 13.

136. Examples include: execution of a sentence of death, killing an enemy in battle, killing a felon to prevent escape, or to prevent a felony perpetrated by violence or surprise. R. PERKINS, *supra* note 134, at 1124.

Courts focused on the nature of the actor, not the nature of the murder itself.¹³⁷ Thus, unlike cases of justifiable homicide, the law still punished a person guilty of excusable homicide.¹³⁸ Modern law still embodies this distinction. A murder charge may be reduced to the lesser charge of manslaughter because of some unique characteristic of the defendant, such as state of mind. Hence, if a defendant can prove self-defense, she goes free. If, for example, she can show only that she acted with provocation and in the heat of the moment, she is still punished for manslaughter.¹³⁹

Deadly and Nondeadly Force. Second, courts considering a claim of self-defense will look at the amount of force that the defendant used. The force used must be reasonable. Traditionally, many courts held that the use of deadly force against nondeadly force was per se unreasonable.¹⁴⁰ Thus, while being beaten, kicked, or threatened with violence (but without a weapon), a woman could not use a weapon to defend herself. For example, deadly force was the key issue in *Commonwealth v. Zenyuh*.¹⁴¹ In that case, the victim was beating his wife, refused to let her leave, and came at her in a rage. She then picked up a kitchen knife and stabbed him.¹⁴² The majority found that the defendant wife had acted in self-defense.¹⁴³ The dissent, however, stated that "more is required to justify the use of deadly force in self-defense than an enraged and abusive perpetrator and a threat issued several years previously."¹⁴⁴ In another case, *People v. Bush*,¹⁴⁵ the prosecutor told the jury that the victim did not deserve to die for "slapping a woman."¹⁴⁶ In the past, the victim had repeatedly beaten his wife with his fists and feet and had made death threats.¹⁴⁷ On the day of the homicide, he choked her, beat her about the

137. *Id.* at 1124-26. Early examples of excusable homicide were accidental killings, killing by an insane person, and killings in certain types of self-defense (e.g. killing in self-defense when a safe retreat was available). *Id.* See also Crocker, *supra* note 128, at 130-31.

138. At common law, the person who committed an excusable homicide forfeited his life and his goods, although the king generally granted a pardon for the person's life. R. PERKINS, *supra* note 134, at 1124.

139. See e.g. W. LAFAVE, *supra* note 134, at 463; R. PERKINS, *supra* note 134, at 1141-42; Fultz v. State, 439 N.E.2d 659 (Ind. Ct. App. 1982); People v. White, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980); People v. Bush, 84 Cal. App. 3d 294, 148 Cal. Rptr. 430 (1978).

140. See W. LAFAVE, *supra* note 134, at 456; Schneider & Jordan, *supra* note 113, at 17, 23; Schneider, *supra* note 7, at 631.

141. 307 Pa. Super. 253, 453 A.2d 338 (1982).

142. 453 A.2d at 339-40.

143. *Id.* at 340-41.

144. *Id.* at 341.

145. 84 Cal. App. 3d 975, 148 Cal. Rptr. 430 (1978).

146. 148 Cal. Rptr. at 439.

147. *Id.* at 433-34.

face and head, refused to let her leave, and again threatened to kill her.¹⁴⁸

Many legal writers and courts have concluded that the deadly force rule is arbitrary. Women are typically smaller and weaker than men. They are not trained to use their bodies to fight or defend themselves, nor do they learn how to take blows.¹⁴⁹ The common law view of nondeadly force presupposes two men each of approximately equal size, weight, and strength fighting each other.¹⁵⁰ When one of the parties to the fight is a woman, however, the punching, hitting, and kicking can amount to deadly force. Most women are socialized to be somewhat passive and nonaggressive, to get along, and to keep the peace. These feminine traits are frequently even more pronounced in the battered woman.¹⁵¹ Moreover, a battered woman may have discovered that using her own body (*i.e.* fists, feet) to defend herself only makes her abuser angrier and more violent.¹⁵² Thus, when evaluating self-defense claims, the modern trend is to consider the respective size of the parties, their sex, the particularly violent nature of the attack, and the attacker's reputation for violence or violent history.¹⁵³

Imminent Danger. The element of imminent or immediate danger is a more fundamental problem with a battered woman's plea of self-defense. In the well-known case of *People v. Garcia*,¹⁵⁴ two men raped and beat defendant then threatened to return and assault her again. Garcia went home, got a gun and hunted down her attackers, later finding and killing one of them.¹⁵⁵ The court eventually acquitted Garcia on self-defense grounds.¹⁵⁶ The case was heralded as a landmark decision affecting a woman's right to defend herself.¹⁵⁷ Frequently, a battered woman who kills does so after a particularly severe or violent incident coupled with a threat of an even more severe beating or death by her assailant. She perceives that something about her attacker's behavior is 'different' this

148. *Id.* at 434-35.

149. See Crocker, *supra* note 128, at 127; Walker, *supra* note 124, at 7; Schneider & Jordan, *supra* note 113, at 18, 22.

150. See *e.g.*, R. PERKINS, *supra* note 134, at 1121, 1134; Schneider & Jordan, *supra* note 113, at 18, 23; Schneider, *supra* note 7, at 631-32.

151. See *supra* note 35 and accompanying text.

152. See THE BATTERED WOMAN, *supra* note 4, at 61-62; R. DOBASH, *supra* note 6, at 108.

153. See W. LAFAVE, *supra* note 134, at 457; Crocker, *supra* note 128, at 132; Schneider & Jordan, *supra* note 113, at 22-24; Eisenberg & Dillon, *Medico-Legal Aspects of Representing the Battered Woman*, 5 OKLA. CITY U.L. REV. 645, 654-55 (1980).

154. 54 Cal. App. 3d 61, 126 Cal. Rptr. 275 (1975), *cert. denied*, 426 U.S. 911 (1976).

155. 126 Cal. Rptr. at 281. The facts were recounted in Walker, *supra* note 124, at 4.

156. Garcia pleaded insanity and the court convicted her of second-degree murder at her first trial, but the appellate court reversed the decision. 126 Cal. Rptr. at 281. She was later acquitted, *People v. Garcia*, Cr. No. 4259 (Sup. Ct. Monterrey Calif. 1977).

157. See, *e.g.*, Walker, *supra* note 124, at 4; Schneider & Jordan, *supra* note 113, at 1.

time, and the battered woman believes he will make good on his threats.¹⁵⁸ Thus, after he falls asleep or turns his back, she acts.

The element of immediacy was the key issue in *State v. Gallegos*,¹⁵⁹ in which defendant shot the victim while he was lying on the bed.¹⁶⁰ On the day of the killing, the victim had sexually abused defendant, threatened to kill her, and struck their child in the face with a belt buckle.¹⁶¹ The New Mexico Court of Appeals adopted a hybrid standard for the fear of immediate danger element of self-defense. The fact-finder must consider defendant's perceptions of immediate threat of harm and whether a reasonable person, in similar circumstances, would also act in self-defense.¹⁶² Defendant warranted a self-defense instruction. Similarly, in *State v. Leidholm*,¹⁶³ defendant stabbed her husband while he slept.¹⁶⁴ The evidence at trial revealed a long history of abuse and an abusive incident on the night of the homicide.¹⁶⁵ The North Dakota Supreme Court adopted a subjective standard for self-defense: whether the accused believed that deadly force was necessary to protect herself against imminent unlawful harm.¹⁶⁶ In contrast, the Pennsylvania Superior Court refused to allow a self-defense instruction when defendant shot her sleeping husband and set his body on fire.¹⁶⁷ The court excluded evidence of the husband's pattern of abusive behavior and of particular violent acts.¹⁶⁸ Because the victim was drunk and asleep at the time of the murder, the court found no imminent danger on that "present occasion."¹⁶⁹ In *State v. Nunn*,¹⁷⁰ the Iowa Court of Appeals held that defendant's killing of her live-in boyfriend was not justified when the argument had ended several minutes before the stabbing and the victim was unarmed.¹⁷¹ The court found that defendant's fear of imminent life-threatening danger was not reasonable

158. See Bochnak, *Case Preparation and Development in WOMEN'S SELF-DEFENSE CASES* 41, 44-46 (E. Bochnak ed. 1981); Schneider *supra* note 7, at 634. See also the discussion of the factors affecting the likelihood of a homicide at *supra* note 129 and accompanying text.

159. 104 N.M. 247, 719 P.2d 1268 (1986).

160. 719 P.2d at 1269.

161. *Id.* at 1272.

162. *Id.* at 1271. See also the discussion of subjective and objective standards of reasonableness at notes 194-208 *infra* and accompanying text.

163. 334 N.W.2d 811 (N.D. 1983).

164. *Id.* at 814.

165. *Id.* at 813.

166. *Id.* at 817-18.

167. Commonwealth v. Grove, 526 A.2d 369, 371 (Pa. Super. 1987).

168. *Id.* at 371.

169. *Id.* at 373.

170. 356 N.W.2d 601 (Iowa Ct. App. 1984).

171. *Id.* at 604. This case is also unique in that the evidence showed violent conduct by both parties. *Id.*

under the circumstances,¹⁷² despite defendant's evidence of a violent relationship and the victim's threat to kill her on the day of the murder.¹⁷³ In *Fultz v. State*,¹⁷⁴ the Indiana Court of Appeals refused to allow defendant's evidence of the victim's violent behavior because she had not pleaded self-defense.¹⁷⁵ In *Fultz*, defendant shot the victim after he pointed a finger at her and made inaudible threats. She offered to show a history of severe abuse beginning in 1973.¹⁷⁶ In catch-22 reasoning, the court found that defendant had not shown the victim had committed an aggressive act sufficient for her to form a reasonable belief that she was in imminent danger. Therefore, she had not presented a self-defense claim and could not present evidence of his past violent acts.¹⁷⁷

Again, legal scholars argue that the inherent differences between men and women should be considered. A woman will usually not be able to defend herself during an actual attack. A battered woman is usually in a state of learned helplessness and hopelessness. She may reasonably believe that she cannot run away, that she has nowhere to go,¹⁷⁸ and even if she does leave, that her abuser will track her down and continue his tormenting behavior.¹⁷⁹ The Kansas Supreme Court faced this problem in *State v. Hundley*.¹⁸⁰ Defendant moved out of her home after ten years of abuse by her husband. Her husband, however, continued to harass and threaten her.¹⁸¹ On the day of the killing, the victim broke into defendant's motel room and hit, choked, and sexually assaulted her. Afterwards, he gave her money and told her to buy him cigarettes. Defendant felt threatened as her husband reached for a beer bottle at his side, since he had hit her with such a weapon in the past. She shot her husband as he reached for the bottle.¹⁸² The jury convicted her of involuntary manslaughter.¹⁸³ The supreme court reversed, however, because the trial court used the term 'immediate' danger in the jury instructions instead of the statutory word "imminent."¹⁸⁴ The court found that the term 'immediate'

172. *Id.*

173. *Id.* at 603.

174. 439 N.E.2d 659 (Ind. Ct. App. 1982).

175. *Id.* at 662.

176. *Id.*

177. *Id.*

178. See Crocker, *supra* note 128, at 133-34; Buda & Butler, *supra* note 124, at 378. See also *supra* notes 52-70 and accompanying text.

179. Crocker, *supra* note 128, at 134; THE BATTERED WOMAN, *supra* note 4, at 203; D. MARTIN, *supra* note 2, at 77.

180. 236 Kan. 461, 693 P.2d 475 (1985).

181. 693 P.2d at 475-76.

182. *Id.* at 476.

183. *Id.* at 477.

184. *Id.* at 480 (The Kansas Supreme Court reaffirmed this finding in *State v. Hodges*, 239 Kan. 63, 716 P.2d 563, 570-71 (1986)).

placed "undue emphasis on the immediate action of the deceased, and obliterated the nature of the buildup of terror and fear which had been systematically created over a long period of time."¹⁸⁵ The dissent found no immediate or imminent danger of harm¹⁸⁶ and apparently argued that defendant should have retreated: "At the very least, defendant would have had a five minute head start on the defendant [sic] had she failed to return with the cigarettes."¹⁸⁷ The retreat issue can be one of the most difficult issues in the battered woman's claim of self-defense, but, given appropriate circumstances,¹⁸⁸ a lull in the attack should not preclude the claim entirely.

Duty to Retreat. That one may use nondeadly force to repel an attack without an obligation to retreat is well-accepted.¹⁸⁹ The majority of jurisdictions hold that the innocent party has no duty to retreat and may use deadly force if she reasonably believes that the attacker will kill her or inflict great bodily harm.¹⁹⁰ In the minority view, the defender is required to retreat, if she can safely do so, before resorting to deadly force.¹⁹¹ Even in the minority jurisdictions, however, the defender need not retreat if she cannot do so safely or is in her own home.¹⁹² Assuming that a battered wife could show a reasonable perception of imminent and lethal danger, she should not have a problem with the no-retreat rule in a majority view jurisdiction.¹⁹³ In a minority jurisdiction, however, she may have some difficulties. First, even though the battered woman is usually in her house when violence occurs,¹⁹⁴ her attacker is not an intruder, but an inhabitant of the house as well. This may affect her privilege not to

185. *Id.* at 479.

186. *Id.* at 480-81 (McFarland, J., dissenting).

187. *Id.* at 481.

188. Appropriate circumstances should include proof of the other elements of a self-defense claim (discussed in this article) coupled with specific evidence about this particular defendant's situation (course of battering relationships, specific threats, other indicia of likely violent attack).

189. W. LAFAYE, *supra* note 134, at 456, 460; R. PERKINS, *supra* note 134, at 1116-17.

190. W. LAFAYE, *supra* note 134, at 460-61; R. PERKINS, *supra* note 134, at 1127.

191. W. LAFAYE, *supra* note 134, at 461; R. PERKINS, *supra* note 134, at 1133.

192. W. LAFAYE, *supra* note 134, at 461; R. PERKINS, *supra* note 134, at 1133.

193. See, e.g., *People v. Emick*, 103 A.D.2d 643, 481 N.Y.S.2d 552, 563 (1984) (defendant had no duty to retreat when she was attacked in her own home and was not the initial aggressor); *State v. Leidholm*, 334 N.W.2d 811, 821 (N.D. 1983) (if the facts and circumstances create an honest and reasonable belief in defendant's own mind that he cannot safely retreat from a cohabitant-assailant, his use of deadly force is justified). See also *State v. Sales*, 285 S.C. 113, 328 S.E.2d 619 (1985).

194. See *THE BATTERED WOMAN SYNDROME*, *supra* note 9, at 150; R. DOBASH, *supra* note 6, at 122; Gelles, *No Place to Go: The Social Dynamics of Marital Violence*, in *BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE* 48 (M. Roy ed. 1977).

retreat in a few states.¹⁹⁵ Second, the battered woman might need to address her ability to retreat safely. Many factors, however, could affect that ability, and the court and jury should consider them if presented.¹⁹⁶

D. Sex Bias and the "Reasonableness" Standard

As the previous sections indicate, a male viewpoint permeates the law of self-defense. The common law of self-defense developed (and the modern law continues with) a concept of self-defense that is based on male notions of a 'fair fight,' of courageousness and cowardice, and of danger and immediacy of harm.¹⁹⁷ Some states use an objective test of reasonableness in evaluating a self-defense claim. That is, the courts in those states ask juries to decide how an ordinary, intelligent, and prudent person would react under all of the circumstances in assessing the reasonableness of the defendant's action.¹⁹⁸ Other states have a so-called subjective standard. The courts in those states ask juries to decide whether the defendant's perception of the danger and immediacy of the harm and the amount of force used was reasonable, given all of the circumstances.¹⁹⁹ In

195. See Walker, *supra* note 124, at 5-6; Bochnak, *supra* note 157, at 46-47. See, e.g., State v. Bobbitt, 415 So. 2d 724 (Fla. 1982); Carter v. State, 469 So. 2d 194 (Fla. Dist. Ct. App. 1985); State v. Shaw, 185 Conn. 372, 441 A.2d 561 (1981); State v. Pontery, 19 N.J. 457, 117 A.2d 473 (1955); State v. Grierson, 96 N.H. 36, 69 A.2d 851 (1949) (all cases generally held that the privilege not to retreat in your own dwelling place does not apply when the attacker is a co-occupant of the dwelling).

196. Bochnak, *supra* note 157, at 47, lists some of the considerations that a factfinder might want to evaluate: physical factors such as the layout of the house, the weather, the hours, what the defendant was wearing, whether she had money or car keys, etc.; and psychological factors such as threats made by the victim, whether the defendant sought help and was refused it in the past, the presence of children in the house, etc. *Id.*

197. See Crocker, *supra* note 128, at 126-27; Schneider & Jordan, *supra* note 113, at 14; Schneider, *supra* note 7, at 635.

198. See W. LAFAVE, *supra* note 134, at 455; Crocker, *supra* note 128, at 125; Butler & Buda, *supra* note 124, at 370-71; Schneider & Jordan, *supra* note 113, at 16.

199. W. LAFAVE, *supra* note 134, at 455. This distinction between subjective and objective standards of self-defense was the key issue in State v. Leidholm, 334 N.W.2d 811 (N.D. 1983). In that case, the North Dakota Supreme Court found that a jury instruction setting forth an objective standard for evaluation of the reasonableness of the defendant's belief in the necessity of the use of deadly force in defending herself was in error: the standard is subjective. *Id.* at 817-19. The court cited several cases in which courts held the standard to be objective and several which courts found the standard to be subjective. *Id.* at 817-18. In most of the cases surveyed for this article, the courts appeared to use the subjective standard if one of the parties raised the issue. See, e.g., State v. Hodges, 239 Kan. 63, 716 P.2d 563, 569 (1986) (adopting a subjective standard for self-defense claim when battered woman syndrome is in issue); State v. Gallegos, 104 N.M. 247, 719 P.2d 1268, 1271 (1986) (although the court calls it a "hybrid" test, the key is the individual perception of the defendant); People v. Torres, 128 Misc. 2d 129, 488 N.Y.S.2d 358, 360 (1985); Fielder v. State, 683 S.W.2d 565, 592 (Tex. Ct. App. 1985); State v. Allery, 101 Wash. 2d 591, 682 P.2d 312, 314-

both cases, however, courts are using a male standard of reasonableness. Yet, what is deemed to be reasonable for a man may not be so for a woman (and vice-versa). In fact, as one author points out, "[f]emale traits have been viewed as the antithesis"²⁰⁰ of logic and reasonableness. Being female means being "emotional and incapable of rational thought."²⁰¹

The Washington Supreme Court explicitly recognized this issue in *State v. Wanrow*.²⁰² Although defendant was not a battered woman, she claimed self-defense in response to charges of second degree murder and first degree assault.²⁰³ Four of the eight justices found the trial court's instruction to the jury on self-defense defective for two reasons. First, the instruction appeared to present an objective standard for self-defense, while Washington state law provides for a subjective standard.²⁰⁴ Second, the court pointed out that the use of the male pronoun in the jury instruction left the "jury with the impression that the objective standard . . . is that applicable to an altercation between two men."²⁰⁵ The court continued:

care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. *To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.*²⁰⁶

One can use an Illinois case, *People v. White*,²⁰⁷ to illustrate the male orientation of a reasonableness standard. In that case, the victim had in the past broken defendant's elbow, fractured her ribs, dislocated her elbow, given her cuts on the face from a broken bottle, and hit her on the head with a car jack (leaving permanent scars). He had caused several

15 (1984); *State v. Thomas*, 13 Ohio App. 3d 211, 468 N.E.2d 763, 764-65 (1983); *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196, 199 (1980). *But see* *Terry v. State*, 467 So. 2d 761, 764 (Fla. Dist. Ct. App. 1985) and *People v. Bush*, 84 Cal. App. 3d 975, 148 Cal. Rptr. 430, 436 (1978) (standard appears to be objective).

200. *Schneider*, *supra* note 7, at 636.

201. *Id.*

202. 88 Wash. 2d 221, 559 P.2d 548 (1977).

203. 559 P.2d at 550. Ms. Wanrow (who was 5'4", had a broken leg and was using a crutch) shot the victim (a 6'2" man, who was intoxicated) when he entered the home where she was staying, came up behind her, startled her, and refused to leave. The evidence showed that the victim was purportedly a child molester who had tried to molest Ms. Wanrow's son, and had successfully attacked other children. *Id.* at 550-51, 558.

204. *Id.* at 558. This would include facts and circumstances known to the defendant before the actual killing.

205. *Id.*

206. *Id.* at 559 (emphasis added).

207. 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980).

injuries that required surgery.²⁰⁸ On the day of the killing, the victim threatened defendant with a beating. She went into the bedroom and got a gun. When the victim ran and walked toward her, she shot him.²⁰⁹ The jury found that defendant's belief that deadly force was necessary to prevent death or great bodily harm was not reasonable.²¹⁰ The trial court also refused to admit testimony on the battered woman syndrome.²¹¹ The appellate court affirmed the conviction of voluntary manslaughter.²¹² Of course, to second-guess the trier of fact in cases like this is impossible, but the facts do seem to indicate that a very narrow view of reasonableness defeats a potentially valid claim of self-defense.

In order to remedy this problem, some scholars (feminist and otherwise) have proposed standards or tests, other than the reasonable man standard, for the courts to use in self-defense cases. One suggested approach is a sex-neutral standard. The reasonable man standard purports to be sex-neutral, but as illustrated above, it may not be so in the self-defense area. The proposed standard would be an individualized approach to the defendant's self-defense claim. The court and the jury would focus on the battered woman's personal experiences with violence at the hands of her abuser. The defense would use expert testimony to challenge commonly held beliefs about the battered woman and her situation.²¹³ The question would be: did this person act in a manner that was reasonable for this individual? As other authors have argued, however, this test raises a sex based stereotyping problem. By focusing on the individual characteristics of the battered woman, we run the risk of emphasizing the weaknesses and idiosyncrasies of the female sex in general and the battered woman in particular. This test may actually reinforce the very stereotyped myths that the individualization test attempts to avoid.²¹⁴

A second approach is the creation of an altogether separate defense based on the battered woman syndrome. This defense would be a 'subset' of the self-defense claim, available only to battered women. The court and the jury would determine if the defendant's actions were reasonable for a battered woman. Of course, the court would require the defendant to show that she is a battered woman and that she, her abuser, and their

208. 414 N.E.2d at 198.

209. *Id.*

210. *Id.* at 199.

211. *Id.* at 200.

212. *Id.* at 201.

213. See, e.g., Bochnak, *supra* note 157, at 42-43; Schneider, *supra* note 7, at 639-40.

214. This criticism is the major thrust of Phyllis Crocker's recent article. Crocker, *supra* note 128, at 136-37. However, critics have expressed this concern for many years. See, e.g., Meyers, *Battered Wives, Dead Husbands*, *STUDENT LAWYER*, March 1978, at 46, 48.

relationship at least generally fit the pattern of the syndrome.²¹⁵ This proposed separate standard is also subject to criticism. First, this test creates some of the same problems as the individualization approach because it may tend to perpetuate and renew stereotypes about women and battered women.²¹⁶ Second, it appears to substitute one unsatisfactory standard (reasonable man) for another (reasonable battered woman). A woman with a history of abuse must fit into the pigeonhole of the typical battering relationship. She should be passive, stay-at-home, never fight back, never leave her abuser, and the like. If she does not fit into this narrow class of persons, the defense is not available to her.²¹⁷ Third, critics have raised the issue of equal protection in this context. Although the reasonable man standard arguably violates the equal protection rights of women in self-defense cases,²¹⁸ a "reasonable battered woman" standard may violate the same rights for male homicide defendants and male victims.²¹⁹ One article notes that the Supreme Court has held that when a gender-neutral standard will serve the state's purpose in remedying sex based discrimination a state may not use a classification based on sex.²²⁰

215. As one author notes, this seems to be the approach that courts actually take when a battered woman presents evidence of her victim's abusive behavior along with a claim of self-defense. Crocker, *supra* note 128, at 144-45 and cases cited therein.

216. See *supra* note 210 and accompanying text.

217. Crocker, *supra* note 128, at 149-50; "The debate becomes whether the defendant is entitled to claim that she defended herself, not whether she was reasonable to do so." *Id.* Another concern is that the creation of a reasonable battered woman defense would automatically excuse spouse murders committed by battered women. See Bochnak, *supra* note 157, at 42-43 (The past abuse does not and should not justify the killing, it simply helps to explain the woman's beliefs and perceptions at the time); State v. Leidholm, 334 N.W.2d 811, 820 n.8 (N.D. 1983) ("the law of self-defense will not be judicially orchestrated to accommodate a theory that the existence of battered woman syndrome in an abusive relationship operates in and of itself to justify or excuse a homicide"); State v. Kelly, 33 Wash. App. 541, 544, 655 P.2d 1202, 1203 (1982) ("The existence of the syndrome in a marriage does not itself establish the legal right of the wife to kill the husband . . .").

218. Buda & Butler, *supra* note 124, at 380-81; Schneider & Jordan, *supra* note 113, at 20-21. Both authorities cite the *Wanrow* decision, which explicitly recognized the equal protection threat to women inherent in the reasonable man standard for self-defense. State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548, 549 (1977).

219. See Rittenmeyer, *Of Battered Wives, Self-Defense and Double Standards of Justice*, 9 J. CRIM. JUST. 389, 394-95 (1981); Butler & Buda, *supra* note 124, at 378-79; Note, *Does Wife Abuse Justify Homicide?* 24 WAYNE L. REV. 1705, 1721 (1978).

220. Buda & Butler, *supra* note 124, at 379 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)) (Gender classifications must serve important government objectives and be substantially related to the achievement of those objectives. State statute, establishing different legal drinking ages, was invalid because statistics showing higher percentage of males involved in drunk-driving incidents was insufficient to meet the test and gender-neutral methods were available.); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (Statute requiring husbands, but not wives, to pay alimony was unconstitutional if gender-neutral alternative would serve to alleviate problem of past discrimination).

A third possibility is the creation of a separate standard for self-defense based on a reasonable *woman's* (not necessarily a reasonable battered woman) perception of danger, harm, and force.²²¹ This has the advantage of allowing all women (not just battered women) equal access to the claim of self-defense. This standard, however, is subject to the criticisms of sex stereotype reinforcement and possible equal protection violation. An advocate of this approach also notes a unique problem with the 'reasonable woman' test. As an objective test, this standard should be universal, unbiased, and completely neutral. In our society and legal system, however, this standard of objectivity has traditionally been the male notion of objectivity. We do not have a working concept of female objectivity untainted by the male viewpoint.²²² As Phyllis Crocker, the proponent of this test, points out, a woman's experiences as an individual and as a battered woman "are not sex-neutral: they are sex-specific, sex-linked and sex-charged."²²³ A woman's reaction in a situation in which a man threatens her, particularly her spouse or boyfriend, will be intrinsically and significantly different than that of a man in a similar situation. The equal protection argument that the reasonable woman standard only emphasizes the differences between men and women may be unavoidable in these cases. This argument, however, might be answered by pointing out that this is *not* an area where a sex neutral standard will remedy the discrimination inherent in the proof of a self-defense claim.

Finally, of course, it should be noted that many legal thinkers and writers object to any change in the existing law. In their view, the reasonable man standard for self-defense claims adequately protects all parties involved. To change the standard would amount to a declaration of an open season on, or a license to kill, all abusive or battering men, regardless of individual circumstances.²²⁴ A change of the standard would not protect the victims of homicide. It might lead to false assertions of self-defense by all wives who kill their husbands.²²⁵ Arguably this has already happened in a number of cases.²²⁶ Yet, the trier of fact should still be able to

221. Crocker, *supra* note 128, at 152.

222. *Id.*

223. *Id.* at 151.

224. See Meyers, *supra* note 214, at 47-48; *Does Wife Abuse Justify Homicide?*, *supra* note 219, at 1731, cited in Note, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895, 930 n.190 (1981).

225. See *supra* note 213.

226. See, e.g., *State v. Martin*, 666 S.W.2d 895 (Mo. Ct. App. 1984) and *State v. Leaphart*, 673 S.W.2d 870 (Tenn. Crim. App. 1983) (defendants hired killers to murder victims); *Strong v. State*, 251 Ga. 540, 307 S.E.2d 912 (1983) (evidence tended to show that victim may have been acting defensively at time of stabbing); *People v. Minnis*, 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983) (evidence unclear, but defendant apparently strangled victim while he slept, then dismembered the victim's body and disposed of it in various dump-

evaluate the circumstances and refuse to recognize a spurious claim.

IV. EXPERT TESTIMONY

A. Introduction

The case law addressing the phenomenon of the battered woman syndrome is relatively new. Only in the past decade have defense attorneys raised the issue. Due to increased public awareness and understanding of the scope and severity of the wife abuse problem, state courts and clinical psychologists began to grapple with the concept of the battered woman syndrome in the latter 1970s.²²⁷ In time, attorneys began to offer expert testimony on the existence of, and the effects resulting from, the battered woman syndrome in cases in which female clients had killed or injured their abusers. The attorneys offered evidence to establish a woman's state of mind when presenting a self-defense claim or when attempting to prove a lesser offense.²²⁸ Expert evidence is often crucial to a battered woman's claim of self-defense because (as previous sections indicate) society widely subscribes to the myths surrounding the abusive relationship. This includes not only jurors, but prosecutors and judges.²²⁹ The expert can break down some of these barriers in appropriate cases. The debate concerning the admissibility of expert testimony on the subject of the battered woman syndrome has centered on several issues: general acceptance of the syndrome within the scientific community; relevance of such testimony; whether the syndrome is beyond the understanding of the average juror; and the possible prejudicial impact of the testimony.²³⁰

The courts have split on the question of allowing expert testimony

sters); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981) (evidence showed defendant probably the aggressor).

227. See THE BATTERED WOMAN SYNDROME, *supra* note 9 (describing the trend and development of the battered woman syndrome since the latter 1970's); see also *People v. Powell*, 102 Misc. 2d 775, 781, 424 N.Y.S.2d 626, 630-31 (1980) (theory of the battered woman syndrome and learned helplessness as applied to battered women was not generally available before 1979); *Buhrle v. State*, 627 P.2d 1374, 1377 (Wyo. 1981) (court stated that research on the battered woman syndrome is in its infancy); *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979); *State v. Dozier*, 163 W. Va. 192, 255 S.E.2d 552 (1979).

228. See *State v. Kelly*, 97 N.J. 178, 478 A.2d 364, 375-77 (1984) (court held that expert testimony is admissible to show defendant's state of mind and that she was in imminent danger of death or serious injury); *People v. Minnis*, 455 N.E.2d at 217 (court held that expert testimony is admissible to show wife's emotional condition and why she dismembered her husband's body); Macpherson, Ridolfi, Sternberg & Wiley, *Expert Testimony*, in *WOMEN'S SELF-DEFENSE CASES* 87, 93-96 (E. Bochnak ed. 1981). See also notes 229-33 *infra* and accompanying text.

229. See *supra* notes 97-103 and accompanying text.

230. E.g., *Ibn-Tamas*, 407 A.2d at 626; *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981); *Kelly*, 478 A.2d at 364.

about the battered woman syndrome, but the trend is in favor of admissibility.²³¹ A survey of the most recent case law shows that twenty-two cases support the admissibility of expert testimony,²³² while only nine cases disallow the expert evidence.²³³ The reasons for admitting or disallowing expert testimony, however, vary with the facts and circumstances of each case. The following section will discuss the path a court typically will take in addressing the admissibility of expert testimony on the battered woman syndrome, particularly in a homicide case.

B. Traditional Standards

In determining whether expert testimony is admissible in any case, courts generally will require that the testimony meet the three criteria set forth in *Dyas v. United States*,²³⁴ or the criteria set forth in rule 702 of the Federal Rules of Evidence.²³⁵ The following discussion will analyze the admissibility of expert testimony on the battered woman syndrome

231. Compare the following cases that support admission: *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984); and *State v. Gallegos*, 104 N.M. 247, 719 P.2d 1268 (1986); with the following which disallow the expert evidence: *Mullis v. State*, 248 Ga. 338, 282 S.E.2d 334 (1981); and *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981); and *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981).

232. *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979); *Terry v. State*, 467 So. 2d 761 (Fla. Dist. Ct. App. 1985); *Borders v. State*, 433 So. 2d 1325 (Fla. Dist. Ct. App. 1983); *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982); *Strong v. State*, 251 Ga. 540, 307 S.E.2d 912 (1983); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *People v. Minnis*, 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983); *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986); *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *May v. State*, 460 So. 2d 778 (Miss. 1984); *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984); *State v. Gallegos*, 104 N.M. 247, 719 P.2d 1268 (1986); *People v. Emick*, 103 A.2d 643, 481 N.Y.S.2d 552 (1984); *People v. Torres*, 128 Misc. 2d 358, 488 N.Y.S.2d 358 (1985); *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983); *State v. Thomas*, 13 Ohio App. 3d 211, 468 N.E.2d 763 (1983); *State v. Kelly*, 102 Wash. 2d 188, 685 P.2d 564 (1984); *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312 (1984); *State v. Dozier*, 163 W. Va. 192, 255 S.E.2d 552 (1979); *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983).

233. *Ibn-Tamas v. United States*, 455 A.2d 893 (D.C. 1983); *Mullis v. State*, 248 Ga. 338, 282 S.E.2d 334 (1981); *People v. White* 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980); *Fultz v. State*, 439 N.E.2d 659 (Ind. Ct. App. 1982); *State v. Martin*, 666 S.W.2d 895 (Mo. Ct. App. 1984); *People v. Powell*, 102 Misc. 2d 775, 424 N.Y.S.2d 626 (1980); *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981); *Fielder v. State*, 683 S.W.2d 565 (Tex. App. Ct. 1985); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981).

234. 376 A.2d 827 (D.C. 1977), cert. denied, 434 U.S. 973 (1977); see *Hawthorne v. State*, 408 So. 2d 801, 805 (Fla. Dist. Ct. App. 1982) and *Ibn-Tamas v. United States*, 407 A.2d 626, 632, 633 (D.C. 1979) (both cases adopting *Dyas* three-fold test for admissibility).

235. FED. R. EVID. 702; see *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312, 315 (1984) (follows Federal Rule 702 to determine admissibility of expert testimony).

under the *Dyas* test, and the Federal Rules of Evidence.

Under the *Dyas* test the party seeking to introduce the expert testimony must meet the following three criteria: (1) "the subject matter 'must also be so distinctively related to some science, profession, business or occupation *as to be beyond the ken of the average laymen*,'" ²³⁶ (2) "the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference *will probably aid the trier in his search for truth*,'" ²³⁷ and (3) that "expert testimony is [admissible only] if 'the state of the pertinent art or scientific knowledge . . . permit[s] a reasonable opinion to be asserted . . . by an expert.'" ²³⁸ Thus, the subject of the testimony must lend itself to expertise, the proffered expert must be qualified to give it, and the expert must have studied the subject in a manner that will justify expert testimony.

Beyond the Ken. The first requirement of the *Dyas* test is that the subject matter be beyond the understanding of the average layman.²³⁹ At least four courts have admitted expert testimony by explicitly basing the admission on the finding that the battered woman syndrome is beyond the understanding of the average person.²⁴⁰ More specifically, these courts admitted expert testimony (1) to dispel the common misconception that a normal or reasonable person would not remain in such an abusive relationship;²⁴¹ (2) for the specific purpose of bolstering the defendant's posi-

236. 376 A.2d at 832 (quoting *Fennekohl v. United States*, 354 A.2d 238 (D.C. 1976)) (emphasis in original).

237. *Id.* (quoting *Fennekohl*, 354 A.2d at 238) (emphasis in original).

238. *Id.* (quoting *Fennekohl*, 354 A.2d at 238). See C. McCORMICK, *McCORMICK ON EVIDENCE* § 13, 33 (E. Cleary ed. 1984) (McCormick recognizes the three-part test of *Dyas*, but advocates the admission of expert testimony even when the jurors have a general knowledge of the issues) and 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* § 702[02], 702-08 (1981) [hereinafter J. WEINSTEIN] (Weinstein disagrees with the 'beyond the ken' standard stating that "even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful.").

239. 376 A.2d at 832.

240. *State v. Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984) (understanding phenomenon of battered woman syndrome is not within competence of an ordinary person); *Smith v. State*, 247 Ga. 612, 619, 277 S.E.2d 678, 683 (1981) (exclusion of expert testimony was improper because behavior of battered women is beyond the ken of jurors); *Hawthorne v. State*, 408 So. 2d 801, 807 (Fla. Dist. Ct. App. 1982) (expert testimony would aid jurors because they would not otherwise understand why a battered woman would remain with her mate); *Ibn-Tamas v. United States*, 407 A.2d 626, 635 (D.C. 1979) (expert testimony on syndrome would supply an interpretation of facts that is not within understanding of lay person).

241. *Smith*, 247 Ga. at 619, 277 S.E.2d at 683; *Hawthorne*, 408 So. 2d at 807; see also Comment, *The Battered Woman Syndrome in Illinois: Admissibility of Expert Testimony*,

tion and lending credibility to her version of the facts;²⁴² and (3) to show the reasonableness of the defendant's fear that she was in imminent peril of death or serious bodily injury.²⁴³ In contrast, the courts that disallow expert testimony base their reasoning on the belief that the average juror can comprehend the unique fears of the battered woman.²⁴⁴ In addition, a few courts have stated that the 'battered woman syndrome' was not sufficiently developed as a matter of commonly accepted scientific knowledge to warrant expert testimony and its prejudicial impact outweighed its probative value.²⁴⁵

The majority of the courts²⁴⁶ that have considered the issue have fol-

11 S. ILL. U.L.J. 137, 139 (1986) (comments on how women are not "free to leave" and how women become psychologically locked into their situation); Comment, *Expert Testimony on Battered Woman Syndrome: Its Admissibility in Spousal Homicide Cases*, 19 SUFFOLK U.L. REV. 877, 880-81 (1985) (explains that a battered woman falling within the symptoms of the syndrome "often feels that she cannot leave her spouse because of social conditioning, shame, self-blame, and external social and economic conditions").

242. *Ibn-Tamas*, 407 A.2d at 634.

243. *State v. Allery*, 101 Wash. 2d 188, 682 P.2d 312, 316 (1984) (testimony explains reasonableness of her fear and enables jury to overcome stereotyped impressions about women who remain in abusive relationships); see also *State v. Kelly*, 97 N.J. 178, 478 A.2d 364, 377 (1984) (testimony will aid jury in determining whether a reasonable person would have believed imminent danger to her life existed); *Smith*, 247 Ga. at 619, 277 S.E.2d at 683 (expert testified that victims of battered woman syndrome believe that their husbands are capable of killing, that no escape is possible, and that if they leave, their husbands will find them and hurt them even more); *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981) (testimony may have a substantial bearing on woman's perceptions and behavior at time of killing, and it is central to her claim of self-defense); *Hawthorne*, 408 So. 2d at 807 (testimony offered to show that for her to have remained in home and to believe that her life and lives of her children were in imminent danger was reasonable); *Ibn-Tamas*, 407 A.2d at 634 (Dr. Walker's testimony showed that victim's actions provoked a state of fear which led defendant to believe she was in imminent danger, and thus she responded in self-defense).

244. See, e.g., *State v. Thomas*, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981) (expert testimony on the battered woman syndrome is within the understanding of the jury); *Mullis v. State*, 248 Ga. 338, 339, 282 S.E.2d 334, 337 (1981) (reasonable fears of defendant could be comprehended by an average juror); *People v. Powell*, 102 Misc. 2d 775, 781, 424 N.Y.S.2d 626, 631 (N.Y. Co. Ct. 1980) (expert testimony does not add anything to defendant's defense since jury already had heard the testimony of abuse).

245. *Thomas*, 66 Ohio St. 2d at 521, 423 N.E.2d at 140 (" 'battered wife syndrome' is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and its prejudicial impact outweighs its probative value"); *Buhrle v. State*, 627 P.2d 1374, 1377 (Wyo. 1981) (excluded testimony on the battered woman syndrome since the state of the art was not adequately demonstrated).

246. See, e.g., *Smith v. State*, 247 Ga. 612, 277 S.E. 678 (1981); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980); *State v. Dozier*, 163 W. Va. 192, 255 S.E.2d 552 (1979); *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982); see also Comment, *Self-Defense: Battered Woman Syndrome on Trial*, 20 CAL. W.L. REV. 485, 499 (1984).

lowed the landmark decision of *Ibn-Tamas v. United States*.²⁴⁷ This was the first case to address the 'beyond the ken' requirement in detail and the court held that the subject matter of the battered woman syndrome was beyond the ken of the average layman.²⁴⁸ More specifically, the court held that the testimony "would have supplied an interpretation of the facts which differed from the ordinary lay perception . . . advocated by the government."²⁴⁹

In *Ibn-Tamas*, defendant, who was four months pregnant, testified that she shot her husband shortly after he had severely beaten her and threatened her with a pistol.²⁵⁰ Since the deceased did not have a weapon at the time defendant shot him, the prosecution argued that defendant simply had endured enough of her husband's abuse and decided to shoot him at point blank range even though he lay wounded on the floor from a previous shot.²⁵¹ The defense argued that the expert testimony on battered women was relevant and should be admitted. It would help the jury appraise the credibility of appellant's contention that she perceived herself to be in imminent danger from her husband and that she shot him in self-defense.²⁵² The trial court refused to permit this expert testimony, stating that it would invade the province of the jury.²⁵³

The District of Columbia Court of Appeals, however, agreed with the defense and concluded that the expert's testimony could serve at least two basic functions.²⁵⁴ First, the testimony would strengthen Mrs. Ibn-Tamas' general credibility in responding to cross examination designed to show that her testimony about the relationship with her husband was implausible.²⁵⁵ Second, expert evidence would support her testimony that her husband's actions provoked such a state of fear that she believed that she was in imminent danger, and thus she responded by shooting her husband in self-defense.²⁵⁶ Therefore, the appellate court in *Ibn-Tamas* recognized that the expert's testimony that battered women are afraid of their batterers, but do not leave them because they believe that their men

247. 407 A.2d 626 (D.C. 1979).

248. *Id.* at 630.

249. *Id.* at 634-35.

250. *Id.* at 630.

251. *Id.* at 631.

252. *Id.*

253. *Id.*

254. *Id.* at 634. Upon remand for a trial court determination of admissibility, under the second and third parts of the test for admissibility, the trial court found that "defendant failed to establish a general acceptance by the expert's colleagues of the methodology used in the expert's study of battered women." The appellate court upheld this finding. *Ibn-Tamas v. United States*, 455 A.2d 893, 894 (D.C. 1983).

255. 407 A.2d at 634.

256. *Id.*

will find them and hurt them even more, is an inference that is beyond the ken of the average laymen.²⁵⁷ In short, without the expert testimony, jurors ordinarily could not draw this conclusion for themselves.

Similarly, the Georgia Supreme Court, in *Smith v. State*,²⁵⁸ held that the battered woman syndrome was beyond the ken of the average lay person.²⁵⁹ More specifically, the court found that "the expert's testimony explaining why a person suffering from battered woman's syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself, would be such conclusions that jurors could not ordinarily draw for themselves."²⁶⁰ The Florida Court of Appeals also followed this line of reasoning in *Hawthorne v. State*.²⁶¹ The Washington Supreme Court, in *State v. Allery*,²⁶² held that the phenomenon was not within the competence of the ordinary layman, and that the defense should have the option to explain the feelings of the battered woman in order to aid the jury's understanding of why women remain in relationships in which they are abused.²⁶³ The New Jersey Supreme Court, in *State v. Kelly*,²⁶⁴ held that expert testimony was essential to the jury's understanding that Mrs. Kelly's failure to leave her husband was very much part and parcel of her life as a battered wife.²⁶⁵ Mrs. Kelly, a victim of frequent and severe beatings, killed her husband with a pair of scissors following an altercation on the street.²⁶⁶ The court recognized that an average juror would be relatively helpless in comprehending why a battered woman would react in this particular manner. Thus, the court stated that a battering relationship embodies psychological and societal features that are not well understood by lay observers, and therefore is suitable for explanation through expert testimony.²⁶⁷

257. *Id.* See also the discussion of this fear, *supra* notes 71-72 and accompanying text.

258. 247 Ga. 612, 277 S.E.2d 678 (1981).

259. *Id.* at 619, 277 S.E.2d at 683; see also *State v. Anaya* 438 A.2d 892, 894 (Me. 1981) (holding that testimony was more helpful than confusing to the jury); *Hawthorne v. State*, 408 So. 2d 801, 807 (Fla. Dist. Ct. App. 1982) (an expert will aid the jury in understanding why a battered woman would remain in an abusive relationship); *Ibn-Tamas v. United States*, 407 A.2d at 634, 635 (testimony would have supplied an interpretation of the facts that differed from ordinary lay perception).

260. 247 Ga. at 619, 277 S.E.2d at 683; see also *State v. Gallegos*, 104 N.M. 247, 719 P.2d 1268, 1274 (1986); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364, 378 (1984).

261. 408 So. 2d 801 (Fla. Dist. Ct. App. 1982) (court admitted expert testimony to aid jury in understanding why a battered woman would remain in an abusive relationship).

262. 101 Wash. 2d 591, 682 P.2d 312 (1984) (wife shot her husband after suffering from periodic pistol whippings, assaults with knives, and beatings with a tire iron).

263. 682 P.2d at 316.

264. 97 N.J. 178, 478 A.2d 364 (1984).

265. 478 A.2d at 378.

266. *Id.* at 369.

267. *Id.* at 379.

More recently, the New Mexico Court of Appeals, in *State v. Gallegos*,²⁶⁸ admitted such evidence, holding that "[e]xpert testimony is appropriate when the subject of the inquiry is one which jurors of normal experience could not decide without the technical assistance of an individual who possesses particular knowledge of the subject by reason of skill, experience or education."²⁶⁹ A New York supreme court, in *People v. Torres*,²⁷⁰ also admitted expert testimony on the battered woman syndrome, recognizing that the average layman has numerous misconceptions concerning the options available to a victim of domestic violence.²⁷¹ The court stated that the expert's specialized knowledge in the area of family violence would properly assist the jury in understanding the unique pressures faced by the battered woman and enable the jury to disregard their prior erroneous beliefs.²⁷² The Kansas Supreme Court, in *State v. Hodges*,²⁷³ followed the modern trend and admitted expert testimony on the battered woman syndrome. The court found that expert testimony would help to rectify misperceptions that the ordinary lay person has about battered women. The court cited some examples of these common myths: that battered women are free to leave their abusers at any time or that battered women are masochistic so they provoke and enjoy being beaten.²⁷⁴

On the other hand, some courts are not as willing to allow expert testimony concerning battered women to be heard by the jury. For example, the Ohio Supreme Court, in *State v. Thomas*,²⁷⁵ found that the expert testimony on the battered woman syndrome was inadmissible because it was "not distinctly related to some science, profession or occupation so as to be beyond the ken of the average lay person."²⁷⁶ It is worth noting, however, that at this time, the research on the battered woman syndrome was in its youth and much statistical data was still in the preparation stage. Therefore, since the literature on the subject matter of battered women has expanded significantly, the decision might be different today. Similarly, the Wyoming Supreme Court, in *Buhrle v. State*,²⁷⁷ held that an expert's opinions would not be of aid to the jury because of the confus-

268. 104 N.M. 247, 719 P.2d 1268 (1986).

269. 719 P.2d at 1274.

270. 128 Misc. 2d 129, 488 N.Y.S.2d 358 (N.Y. Crim. Ct. 1985).

271. 488 N.Y.S.2d at 362.

272. *Id.*

273. 239 Kan. 63, 716 P.2d 563 (1986).

274. 716 P.2d at 567.

275. 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981) (defendant suffered repeated episodes of physical abuse from her common-law husband which eventually lead to her shooting and killing of her husband).

276. 423 N.E.2d at 139.

277. 627 P.2d 1374 (Wyo. 1981).

ing nature of the proffered testimony.²⁷⁸ Although the court excluded the testimony in *Buhrle*, it stated that "we are not saying that this type of expert testimony is not admissible; we are merely holding that the state of the art was not adequately demonstrated . . . and because of inadequate foundation, the proposed opinions would not aid the jury."²⁷⁹ Again, this case might have come out differently today due to increased research and resulting scientific knowledge about the battered woman syndrome.

The trend indicates that the majority of courts have held that the battered woman phenomenon is beyond the ken of the average juror and that expert testimony therefore is admissible.²⁸⁰ Not only does this testimony help to explain why a battered woman does not leave her mate, nor inform family, friends, or the police, but it also helps the jury understand why a woman could be driven to kill her own husband. Thus, the battered woman syndrome can be said to encompass a matter sufficiently complex to be beyond the understanding of the ordinary lay person.

Skill, Knowledge, or Experience of the Expert Witness. After a court determines that the subject of expert testimony is beyond the ken of the average juror, the court addresses whether the expert possesses the necessary qualifications to testify. A court will consider certain factors in determining whether an expert is qualified in the area of domestic abuse. These factors include the amount of time and practical experience the expert has in the area of family violence, the recognition and the acceptance of that expert's work in the professional community, and any previous courtroom testimony the expert has given on the subject of domestic violence.²⁸¹ In addition, specifically on the topic of the battered woman syndrome, the expert must have a working knowledge of the syndrome to determine if a defendant fits into the pattern. Courts have permitted clinical psychologists,²⁸² social workers,²⁸³ and psychiatrists²⁸⁴ to testify about family violence. Much of the testimony on the battered woman syndrome has been offered to the courts by one witness in particular, Dr.

278. *Id.* at 1377; see also *Mullis v. State*, 248 Ga. 338, 339, 282 S.E.2d 334, 337 (1981) (court in *Mullis* held that to exclude expert testimony on the battered woman syndrome "where the testimony sought to be admitted related to the reasonable fears of a defendant which could be comprehended by the average juror" was not error).

279. *Buhrle*, 627 P.2d at 1378.

280. See *supra* notes 242-76 and accompanying text.

281. Comment, *Self-Defense: Battered Woman Syndrome on Trial*, 20 CAL. W.L. REV. 485, 507 (1984).

282. *People v. Minnis*, 118 Ill. App. 3d. 345, 455 N.E.2d 209 (1983).

283. *State v. Nunn*, 356 N.W.2d 601 (Iowa Ct. App. 1984).

284. *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980).

Lenore Walker.²⁸⁵ According to one author, Dr. Walker's qualifications could serve as a model in this area.²⁸⁶ In the landmark decision of *Ibn-Tamas*,²⁸⁷ discussed previously, the defense offered the testimony of Dr. Walker to describe the battered woman syndrome and to compare appellant with other battered women that Dr. Walker had identified and studied. The court in *Ibn-Tamas* recognized Dr. Walker's skills and experience and admitted the testimony.²⁸⁸

This author's opinion is that without such testimony the average juror would not understand why a battered woman is psychologically unable to leave the battering relationship and why she continues to live with a man who terrorizes her. Furthermore, as the majority of cases indicate, expert testimony is extremely valuable to the jury in determining whether a battered woman's fear and her claim of self-defense are reasonable.

State of the Art. Once a court determines that the subject matter of the battered woman syndrome is beyond the ken of the average juror and that the expert is successfully qualified, the final step addressed by a court is whether the state of the art of the subject matter is able to support an expert opinion.²⁸⁹ This third requirement of the *Dyas* test is linked to whether a particular methodology is generally accepted. This 'general acceptance' standard was first set forth in *Frye v. United States*:²⁹⁰ "While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs."²⁹¹ The basis for this requirement is that expert testimony, without a recognized theoretical basis, will possibly mislead or perhaps deceive the jury.

In *Ibn-Tamas*,²⁹² the court found that the subject matter of the bat-

285. The following cases have received testimony from Dr. L. Walker: *Hawthorne*, 408 So. 2d at 801; *Ibn-Tamas*, 407 A.2d at 626; *Buhrle*, 627 P.2d at 1374.

286. Comment, *A Woman, a Horse, and a Hickory Tree: The Development of Expert Testimony on the Battered Woman Syndrome in Homicide Cases*, 53 UMKC L. REV. 386, 400. Dr. Walker received her doctorate in psychology from Rutgers University. She is a licensed psychologist in private practice. She has been an assistant professor of psychology at Rutgers Medical School and has conducted numerous research projects dealing with battered women. *Id.*

287. 407 A.2d 626 (D.C. 1979).

288. 407 A.2d at 634.

289. *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977). See C. McCORMICK, *supra* note 233, at 34. McCormick recognizes the restriction that evidence is admissible only if the court believes that the state of the pertinent art or scientific knowledge permits a reasonable opinion to be asserted. *Id.*

290. 293 F. 1013 (1923).

291. *Id.* at 1014 (emphasis added).

292. 407 A.2d at 626.

tered woman syndrome was beyond the ken of the average juror and that the expert witness was qualified.²⁹³ Upon remand, however, the trial court found that "defendant failed to establish a general acceptance by the expert's colleagues of the methodology used in the expert's study of 'battered women.'"²⁹⁴ The trial court's finding was subsequently upheld on appeal.²⁹⁵ Thus, the court excluded the testimony on the battered woman syndrome because the defense failed to lay the proper foundation and prove that the study had been generally accepted. More recently, however, a New York supreme court stated in *People v. Torres*:²⁹⁶

[T]he theory underlying the battered woman's syndrome has indeed passed beyond the experimental stage and gained a substantial enough scientific acceptance to warrant admissibility . . . [N]umerous articles and books have been published about the battered woman's syndrome; and recent findings of researchers in the field have confirmed its presence and thereby indicated that the scientific community accepts its underlying premises.²⁹⁷

The New Jersey Supreme Court, in *State v. Kelly*,²⁹⁸ recognized three ways a proponent of scientific evidence can prove its general acceptance: (1) through the expert's testimony; (2) by authoritative scientific and legal writings; and (3) by judicial opinions indicating the expert's premise has been generally accepted.²⁹⁹ Although the judicial opinions are split concerning the scientific acceptability of the syndrome,³⁰⁰ the court ruled

293. *Id.* at 634-35.

294. *Ibn-Tamas v. United States*, 455 A.2d 893, 894 (D.C. 1983).

295. *Id.* at 894.

296. 128 Misc. 2d 129, 488 N.Y.S.2d 358 (N.Y. Crim. Ct. 1985).

297. 488 N.Y.S.2d at 363. In *Torres*, defendant's husband repeatedly struck, beat, and threatened defendant. On the night of the killing, the savageness of defendant's husband's behavior convinced defendant that he meant to kill her. Believing that no other way out existed, defendant grabbed a gun and shot deceased three times while he sat in a chair. *Id.* at 361. The court in *Torres* applied a two-prong test to determine the admissibility of expert testimony on the battered woman syndrome. First, the court considered whether the opinion testimony, based on professional or scientific knowledge, was within the understanding of an ordinary juror. *Id.* at 362. Second, the court considered whether a sufficient state of the art existed to permit expert testimony. After analyzing the facts, the court held that the testimony was outside the range of ordinary training and intelligence and had gained a substantial enough scientific acceptance to warrant admissibility. *Id.* at 363.

298. 97 N.J. 178, 478 A.2d 364 (1984).

299. 478 A.2d at 387.

300. Compare *State v. Hodges*, 239 Kan. 63, 716 P.2d 563 (1986) and *State v. Anaya*, 438 A.2d 892 (Me. 1981) (courts in both cases accepted expert testimony without reservation), with *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982), and *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979) (courts remanded both cases to the trial court to determine the scientific acceptability of expert testimony), and with *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981), and *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981)

that the battered woman syndrome had a sufficient scientific basis to produce uniform and reasonable results.³⁰¹ Similarly, the Kansas Supreme Court, in *State v. Hodges*,³⁰² followed this reasoning, holding that the theory underlying the battered woman syndrome has gained sufficient scientific acceptance to warrant admissibility.³⁰³ Thus, according to the majority of cases, the trend indicates that the syndrome has moved beyond the experimental stage and developed enough general acceptance to warrant admissibility.

C. Other Considerations

Showing that the special requirements for admission of expert testimony are met is only the first stage in getting expert testimony admitted. Courts will also consider questions of relevancy, materiality, prejudice, and probative value in determining the admissibility of expert testimony on the battered woman syndrome. The judge carefully weighs these considerations and decides whether or not the evidence should be admitted or excluded. The defense must establish that testimony about domestic violence and about the defendant's life as a battered woman has probative value that is not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, and misleading the jury.³⁰⁴ The prosecutor, on the other hand will argue that the testimony has no probative value and that the jury should not be concerned with how women react in similar domestic situations, reasoning that only the state of mind of the individual defendant is relevant.³⁰⁵ In addition, the prosecutor will argue that expert testimony diagnosing the defendant as a battered woman should be excluded because the testimony will prejudice the prosecution's case because it labels the deceased as a batterer.³⁰⁶

The case law addressing the questions of relevancy, materiality, prejudice, and probative value of the battered woman syndrome is split among various jurisdictions. For example, in *State v. Thomas*,³⁰⁷ the Ohio Supreme Court considered the issues of relevancy, materiality, and preju-

(both cases held that the subject was not sufficiently established as a matter of scientific expertise).

301. *Kelly*, 478 A.2d at 380.

302. 716 P.2d at 563.

303. *Id.* at 569.

304. Compare *Thomas*, 423 N.E.2d at 140 (holding that expert testimony would stereotype defendant, causing the jury to become prejudiced) with *Anaya*, 438 A.2d at 894 (testimony was highly probative and outweighed any prejudicial impact).

305. See Sternberg, *Admissibility of Expert Testimony on Battering*, in *WOMEN'S SELF-DEFENSE CASES* 210, 217 (E. Bochnak ed. 1981).

306. *Id.* at 219.

307. 423 N.E.2d at 137.

dicial impact before affirming the trial court's exclusion testimony. The court in *Thomas* held that the expert testimony was irrelevant to the self-defense issue and that the prejudicial impact of the testimony outweighed any probative value.³⁰⁸ Likewise, the trial court in *People v. White*,³⁰⁹ refused to allow evidence on the battered woman syndrome because the subject lacked relevancy and materiality.

On the other hand, some courts have found such testimony relevant to the defendant's self-defense claim. For example, the court in *State v. Kelly*³¹⁰ specifically held that expert testimony on the battered woman syndrome was relevant to Mrs. Kelly's state of mind and was admissible to show she honestly believed she was in imminent danger of death.³¹¹ Similarly, the Main Supreme Judicial Court, in *State v. Anaya*,³¹² found that expert testimony on the battered wife syndrome would have been highly probative and more helpful than confusing to the jury.³¹³ The court also stated that the evidence "would have given the jury reason to believe that the defendant's conduct was, contrary to the State's assertions, consistent with her theory of self-defense."³¹⁴

D. The Federal Rules of Evidence

Although the standard three-part test is still viable, the enactment of the Federal Rules of Evidence in 1975 brought about a considerable change in the common law approach to expert witness testimony.³¹⁵ In contrast to the traditional three-part test, rule 702 of the Federal Rules of Evidence³¹⁶ requires only that the expert's scientific, technical, or other specialized knowledge assist the trier of fact. Modern evidence codes have relaxed the limitations, discussed earlier, on the scope of expert testimony. For example, a growing number of jurisdictions are now admitting expert testimony on the ultimate issue in the case, whereas before the

308. *Id.* at 140.

309. 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980).

310. 478 A.2d 364.

311. *Id.* at 377.

312. 438 A.2d 892 (Me. 1981).

313. *Id.* at 894.

314. *Id.*

315. See Comment, *Expert Testimony on Battered Woman Syndrome: Its Admissibility in Spousal Homicide Cases*, 19 SUFFOLK U.L. REV. 877, 884 (commenting on how "the scope of expert testimony [has] undergone considerable liberalization"); see generally C. McCORMICK, *supra* note 238, § 14, at 35 (commenting on the criticism of common law approach and adopting the liberalized view of the FED. R. EVID.).

316. FED. R. EVID. 702. Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

enactment of the Federal Rules, these jurisdictions would have denied such testimony because it invaded the province of the jury.³¹⁷ According to one author, the traditional 'beyond-the-ken' criterion has been abandoned and courts are more willing to admit expert testimony that does no more than sharpen the jury's common sense evaluation of the evidence.³¹⁸ Thus, the key factor now is whether the testimony will help the jury, not whether the subject matter is beyond the ken of the ordinary lay person. In addition, many jurisdictions now allow an expert to give opinion testimony based upon inadmissible evidence or in response to a hypothetical question, whereas before, experts could only give opinion testimony based on the facts in the record or firsthand knowledge.³¹⁹ Thus, these changes have actually expanded the scope of expert testimony and lessened the burdens of admitting the testimony.

Although the Federal Rules of Evidence have modified the rules concerning admissibility of expert testimony, the 'general acceptance in the scientific community' criterion still creates a barrier in many jurisdictions.³²⁰ For example, the Washington Supreme Court, in *State v. Allery*,³²¹ admitted expert testimony on the battered woman syndrome. Following the federal rule 702, the court in *Allery* not only considered the qualifications of the expert and whether the testimony would help the jury, but the court went a step further and considered whether the 'scientific understanding' of the battered woman syndrome was sufficiently developed to admit expert testimony on the syndrome.³²² In other words, the court interpreted rule 702 to include the requirement of 'general acceptance' even though the rule remained silent on that issue.

This 'general acceptance' standard is derived from the language in *Frye v. United States*.³²³ The test is whether the process, system, or theory on which the evidence is based is "sufficiently established to have gained

317. See, e.g., *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981) (this case focused on the 'ultimate issue' question and the court admitted testimony on an ultimate issue whenever the expert concluded that jurors would not be able to draw the inference for themselves). But see *Buhrle*, 627 P.2d 1374 (holding that expert testimony would invade province of jury); see also C. McCORMICK, *supra* note 238, § 12, at 30-31; FED. R. EVID. 704 (testimony that is otherwise admissible is not objectionable merely because it addresses the ultimate issue). Opinions as to questions of law, however, are usually inadmissible. C. McCORMICK, *supra* note 238, § 12, at 32.

318. Rossi, *Modern Evidence and the Expert Witness* 12 LITIGATION 18, 19 (1985).

319. C. McCORMICK, *supra* note 238, § 14, at 35-36; see FED. R. EVID. 703 (the facts or data underlying an expert opinion need not be admissible if the facts or data are of the type relied upon by experts in the particular field).

320. See Rossi, *supra* note 318, at 19-20.

321. 101 Wash. 2d 591, 682 P.2d 312 (1984).

322. 68 P.2d at 315.

323. 293 F. 1013 (D.C. Cir. 1923).

general acceptance in the particular field in which it belongs."³²⁴ The expert testimony on a certain area will not be admissible under *Frye* unless the scientific community approves the new scientific procedures. This is precisely what occurred in *State v. Thomas*,³²⁵ when the court excluded expert testimony on the syndrome, concluding that courts had not generally accepted the battered woman syndrome.³²⁶ The question still remains, however, whether this restrictive general acceptance test survives the enactment of the Federal Rules of Evidence.

Rule 702 says absolutely nothing about the general acceptance standard. In fact, according to one well-known commentator,³²⁷ the silence of the rule should be "regarded as tantamount to an abandonment of the general acceptance standard."³²⁸ Moreover, this author also stated that "Rule 702's failure of the Advisory Committee Notes to even mention the *Frye* case must be considered significant."³²⁹ These comments, considered together with a reasonable reading of the federal rules themselves, seem to indicate that the cornerstone of the test for admissibility of expert testimony is the simple question: Will the testimony help the jury?

V. CONCLUSION

The use of expert testimony in homicide cases where an allegedly battered wife kills her abuser and then claims self-defense to a murder charge is a controversial proposition. The evidence, however, shows that women are frequently the victims of abuse, that patterns of behavior associated with battering relationships usually exist, and that modern American society has been unable to understand or cope with the problem. This failure to deal with the issue of battering extends to the criminal justice system as a whole. It extends to police, prosecutors, judges, and juries. Traditional notions of self-defense and traditional rules regarding admissibility of expert testimony do not transfer well to the battered woman's situation.

The law must take a realistic view of the physical and social differences between men and women when evaluating a battered woman's claim of self-defense to a murder charge. For example, the rule that a woman may not use a weapon against an unarmed male assailant is absurd and arbitrary. Most men could kill a woman with their bare hands. Spouse abusers can be particularly violent and destructive when enraged. We must

324. *Id.* at 1014.

325. 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

326. *Id.* at 138.

327. J. WEINSTEIN, *supra* note 238, § 702[03], at 702-16.

328. *Id.*

329. *Id.*

consider the requirement of imminent or immediate danger for the exercise of self-defense with the male-female differences in mind. Danger can be imminent for a battered woman despite the fact that no actual attack is in progress at the time she tries to defend herself. When a battered woman is attacked in her own home, the law should not require her to retreat before resorting to deadly force.

At the heart of the self-defense issue for a battered woman is the standard against which a battered wife's conduct is to be measured. In this author's view, the 'reasonable woman' test for self-defense is the best choice among the possibilities. This alternative is available to all women on an equal basis; it does not explicitly foster certain female stereotypes but merely acknowledges certain truths about our society and its reflection in the legal system; it is less susceptible to an equal protection challenge than a more narrow test; and, because it contains the requirement of reasonableness or objectivity (albeit from the feminine perspective), it does not permit wholesale murder of women-abusers.

In order to best implement such a significant change in the criminal law, however, state legislatures, not merely the courts, should act in several ways. First, criminal laws should specifically provide for a 'reasonable woman' standard in statutes dealing with the law of self-defense, particularly provisions regarding justification. Second, the evidence rules should explicitly permit lay testimony on the history of an abusive relationship, the nature and frequency of prior violent attacks, and the like. Third, the legislatures should draft proper jury instructions, incorporating a reasonable female standard, and the courts should use them in all cases where a female defendant attempts to present a self-defense claim. The law-makers should give particular emphasis to the justification effect of a valid claim of self-defense, rather than the mere reduction in the level of severity of the crime.

Finally, the courts must admit expert testimony to explain the battered woman syndrome to the jurors. Such testimony could explain the pattern of abusive relationships, clarify commonly misunderstood aspects of those relationships, and debunk some of the myths surrounding battered women. A woman offering such testimony would not have to show that she fits the standard cookie-cutter shape of 'the battered woman,' but in cases in which some elements of the syndrome are present, the evidence would be helpful to the trier of fact.

This concept of helpfulness should be the key element in evaluating the admissibility of expert testimony. If the defendant can convince the court that portions of the battered woman syndrome are involved in her case, the court should admit the evidence. The approach taken by the Federal Rules of Evidence is a sound one. Even in jurisdictions following a more traditional approach, however, expert testimony should be admissible. A thoughtful evaluation of the literature should convince the courts that the

battered woman syndrome is beyond the ken of the average laymen and that the theory of the battered woman syndrome is well-researched and is now well-recognized in the psychological community.

Perhaps, as society becomes more aware of the problem of battering and of ways to prevent it, the incidence of such painful and distressing cases will decrease. Until then, however, the law must deal—and deal fairly—with the battered woman who strikes back at her abuser with deadly results.